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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ALGOMA STEEL CORPORATION, LIMITED,
Petitioner,

v.

THE UNITED STATES and U.S. INTERNATIONAL TRADE COMMISSION,
Respondents,

and

LONE STAR STEEL COMPANY,
Respondent,

IPSCO, INC. AND IPSCO STEEL, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

In an unfair trade investigation, where the Department of Commerce has determined that a substantial percentage of imports were fairly traded, does the antidumping law permit the International Trade Commission to commingle these fairly traded imports with dumped imports to find causation of material injury to a domestic industry?*

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* All parties in this case, as well as all parties to the proceedings below, are named in the caption. Christianson Pipe, Ltd., a plaintiff in this action at the United States Court of International Trade, and Maverick Tube Corporation and Sawhill Tube Division, Cyclops Corporation, both of which were defendants-intervenors in this action at the United States Court of International Trade, did not participate in and were not parties to the proceeding at the United States Court of Appeals for the Federal Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Algoma Steel Corporation, Limited ("Algoma")* respectfully petitions for a writ of certiorari

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* Algoma is wholly owned by Dofasco, Inc., a publicly-traded Canadian corporation. Algoma owns substantial interests in Superior Tube Limited Partnership, Superior Tube Inc., and Ferrum Inc., all Canadian entities. Through a wholly-owned U.S. subsidiary, Cannelton Holding Co., Algoma owns substantial interests in Tilden Iron Ore Partnership, Tilden Magnetite Part-

to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 865 F.2d 240 and is reprinted in the Appendix at pages 1a-7a. The opinion of the United States Court of International Trade is reported at 688 F. Supp. 639 and is reprinted in the Appendix at pages 8a-19a. The final determination and opinion of the U.S. International Trade Commission is published in *Oil Country Tubular Goods From Canada and Taiwan*, USITC Pub. 1865, Inv. Nos. 701-TA-255, 731-TA-276-277 (Final) (June 1986), and is reprinted in the Appendix at pages 20a-48a.

JURISDICTION

Algoma brought this action in the Court of International Trade to reverse an International Trade Commission determination that imports of oil country tubular goods from Canada are a cause of material injury to a domestic industry. On June 8, 1988, the court ruled in favor of the Commission and denied Algoma's motion for judgment on the agency record. On appeal, the Federal Circuit upheld the Court of International Trade in a judgment entered on January 4, 1989. The Federal Circuit subsequently stayed its mandate by orders dated January 30, March 1, and March 31, 1989.

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nership, Tilden Mine Joint Venture, and Marquette Range Coal Service Company, which are all U.S. concerns. Furthermore, Dofasco, Inc. owns substantial interests in I.T.L. Industries Ltd. and Abermin Corporation, both Canadian corporations.

On March 23, 1989, Chief Justice William H. Rehnquist extended the time for filing this petition to and including May 4, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

19 U.S.C. § 1673 (1982 & Supp. IV 1986):

Imposition of antidumping duties

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales . . . of that merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty . . . .

19 U.S.C. § 1673d(a)(1) (1982):

Final determination by administering authority; General rule

Within 75 days after the date of its preliminary determination under section 1673b(b) of this title,

the administering authority shall make a final determination of whether the merchandise which was the subject of the investigation is being, or is likely to be, sold in the United States at less than its fair value.

19 U.S.C. § 1673d(b)(1) (1982 & Supp. IV 1986):

Final determination by Commission; In general

The Commission shall make a final determination of whether—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section.

STATEMENT OF THE CASE

This case involves an appeal of a final affirmative injury determination under the United States antidumping law. No antidumping duties may be imposed on imported merchandise unless (1) the United States Department of Commerce ("Commerce") determines that the merchandise is being sold at dumped prices, and (2) the United States International Trade Commission ("ITC") determines that a domestic industry is materially injured thereby.

Algoma is a Canadian exporter of oil country tubular goods ("OCTG"), which are hollow steel products used in oil and gas drilling. In 1985 Commerce and the ITC began an antidumping investigation concerning OCTG imported from Canada, in which Algoma participated as a respondent. Commerce subsequently determined that some of these imports were being sold in the U.S. at dumped prices.[1] Thereafter, the ITC determined that a domestic industry was materially injured by reason of imports of OCTG.[2] Algoma appealed the ITC's determination on the sole ground that the ITC impermissibly commingled dumped and fairly traded imports in analyzing the cause of the injury to the domestic industry.

To determine whether imports had been dumped, Commerce investigated U.S. sales of OCTG by the four largest Canadian producers, including Algoma, during the six-month period February 1, 1985, through July 31, 1985.[3] As part of its investigation, Commerce compiled a computer list showing, on a sale-by-sale basis, which imports of each Canadian producer were fairly traded and which were dumped.[4] That list re-

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[1] *Oil Country Tubular Goods From Canada*, 51 Fed. Reg. 15,029 (Dep't Comm. 1986) (final determ.).

[2] *Oil Country Tubular Goods From Canada and Taiwan*, USITC Pub. No. 1865, Inv. Nos. 701-TA-255, 731-TA-276-277 (Final) (June 1986), App. at 20a.

[3] Commerce normally investigates import transactions during a six-month period, *see* 19 C.F.R. § 353.38 (1988); however, no specific period of investigation is required by the antidumping law.

[4] Dumping in the context of international trade is not selling below cost, but rather price discrimination between domestic and foreign markets. *NAR, S.p.A. v. United States*, No. 86-12-01638,

vealed that a substantial percentage of all imports of OCTG were fairly traded. 865 F.2d at 241, App. at 2a; 688 F. Supp. at 641, App. at 10a. Commerce's list also showed for each producer the overall percentage, by quantity and value, of imported OCTG that was dumped.

As required by statute, Commerce offered to furnish all of the information it had gathered and generated in its investigation to the ITC, including the list. *Oil Country Tubular Goods From Canada*, 51 Fed. Reg. 15,029, 15,036 (Dep't Comm. 1986) (final determ.). *See* 19 U.S.C. § 1673d(c)(1)(A) (1982). Algoma also submitted Commerce's list to the ITC directly. 865 F.2d at 241, App. at 2a; 688 F. Supp. at 641, App. at 10a.

Algoma urged the ITC to use Commerce's findings in its analysis of the cause of injury to the domestic

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slip op. at 5 (Ct. Int'l Trade Jan. 27, 1989). *See* Jackson, Louis & Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing Economic Rules*, 81 Mich. L. Rev. 267, 273 (1982). Commerce determines whether dumping is taking place by investigating whether imported goods are sold in the United States at lower prices than those at which comparable goods are sold in the exporters' home market. Commerce compares the price of each U.S. sale to a weighted average of home market prices for similar goods during a comparable period. In this way, Commerce determines, on a transaction by transaction basis, which imports were dumped and which were fairly traded. *See* 19 U.S.C. §§ 1673(e), 1677b (1982 & Supp. IV 1986).

Commerce found that three of the four Canadian producers investigated, including Algoma, had both dumped and fairly traded imports during the period of investigation. One producer, Welded Tube of Canada Limited ("Welded Tube"), had only fairly traded imports. *Oil Country Tubular Goods From Canada*, 51 Fed. Reg. at 15,030.

industry[5] and to exclude from that analysis the impact of all imports that Commerce had found to be fairly traded. Algoma argued that this exclusion was required to ensure that any injury that the ITC found was by reason of dumped, rather than fairly traded, imports.[6]

Without addressing Algoma's argument, the ITC refused to exclude the impact of the fairly traded imports from its analysis.[7] It treated injury caused by all OCTG imports from Canada as legally germane without regard to whether the injury had been caused by fairly traded imports. In effect, the ITC "found"

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[5] The ITC normally investigates imports over a three-year period; however, the antidumping law mandates no specific period of investigation. *See Kenda Rubber Indus. Co. v. United States*, 10 CIT 120, 126-27, 630 F. Supp. 354, 359 (1986). The ITC evaluates the subject imports' impact upon the domestic industry producing a "like product" by considering their volume (in both absolute and relative terms), the degree to which their prices undercut prices for the domestic like product, and the tendency of the prices of the subject imports to suppress or depress the prices of the domestic like product. *See* 19 U.S.C. § 1677(7)(C) (1982 & Supp. IV 1986).

[6] The ITC (and its predecessor, the U.S. Tariff Commission) had routinely excluded fairly traded imports from its injury analysis during a twenty-year period ending in the late 1970's. *See, e.g., Silicon Metal from Canada*, USITC Pub. 954, Inv. No. AA1921-192 (Mar. 1979) at 5; *Tantalum Electrolytic Fixed Capacitors From Japan*, USITC Pub. 789, Inv. No. AA1921-159 (Oct. 1976) at 5-6; *Butadiene Acrylonitrile Rubber from Japan*, USITC Pub. 764, Inv. No. AA1921-151 (Mar. 1976) at 5. *Cf. Carbon Steel Bars and Shapes from Canada*, 29 Fed. Reg. 12,559 (Tariff Comm'n 1964) ("(T)he Commission . . . must be satisfied that there is material injury and that it is being caused by the sales-below-fair-value aspect of the goods in question rather than by their mere importation.").

[7] Two Commissioners dissented from the ITC's final affirma-

that 100% of OCTG imports had been dumped.[8] The ITC also failed to determine whether any of the specific instances of material injury upon which it relied, such as sales lost to imports, resulted from imports that Commerce had specifically determined to have been fairly traded.[9] Not surprisingly, the ITC issued a final affirmative injury determination, and as a result Commerce issued an antidumping duty order covering imports of OCTG from Canada. *Oil Country*

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tive determination on grounds not relevant to this appeal. *Oil Country Tubular Goods From Canada and Taiwan*, USITC Pub. 1865, at 1 n.2, App. at 20a n.2.

[8] In the proceedings in the Court of International Trade, the ITC conceded that the ITC effectively presumed that all imports were dumped. *See* Mem. of U.S. Int'l Trade Comm'n in Response to Plaintiffs' Motion for Judgment on the Agency Record at 10 ("The Commission therefore considered all imports of [companies covered by Commerce's determination] in its causation analysis, in spite of plaintiffs' contention that a large proportion of those imports were fairly traded."). *See also id.* at 9 (acknowledging that the Commission's practice "presume[s] that all imports covered by Commerce's affirmative final determination are [dumped] . . . .").

[9] The ITC did, however, exclude from its analysis all imports manufactured by the Canadian producer Welded Tube, based on Commerce's finding that Welded Tube had only fairly traded imports during Commerce's investigation period. *Oil Country Tubular Goods From Canada and Taiwan*, USITC Pub. 1865, at A-4. The ITC excluded all of Welded Tube's imports for its entire three-year period of investigation (January 1, 1983, through December 31, 1985), even though Commerce had not investigated, and had made no findings as to sales of, OCTG produced by Welded Tube outside of its six-month period of investigation. *Id. See Oil Country Tubular Goods From Canada*, 51 Fed. Reg. at 15,029.

Tubular Goods From Canada, 51 Fed. Reg. 21,782 (Dep't Comm. 1986) (antidumping order).[10]

Algoma filed suit in the Court of International Trade, challenging the ITC's final affirmative injury determination.[11] Algoma asserted that this determination was not in accordance with law because the ITC had unlawfully refused to exclude the fairly traded imports from its injury analysis. At oral argument before the court, counsel for the ITC declared that, on the contrary, the antidumping law *requires* that the ITC commingle both dumped and fairly traded imports. Transcript of Oral Argument at 34-35.

On June 8, 1988, the court upheld the ITC's determination. It ruled that, in analyzing the cause of injury, the ITC need not "look behind" Commerce's final affirmative determination, but may treat in the aggregate all imports of merchandise within the "class or kind" covered by Commerce's determination as dumped, regardless of whether individual imports were fairly traded. 688 F. Supp. at 644-45, App. at 15a-17a. The court also held that the ITC is not required to reduce the volume of imports under consideration to reflect the percentage of imports found by Commerce to have been fairly traded. The court thus determined that, as a matter of law, the ITC may rely upon evidence of "injury" *caused by fairly*

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[10] The order did not cover imports of OCTG produced by Welded Tube. *Oil Country Tubular Goods From Canada*, 51 Fed. Reg. at 21,782.

[11] Jurisdiction for Algoma's appeal rested on 19 U.S.C. § 1516a(a)(2)(B)(i) (1982 & Supp. IV 1986) and 28 U.S.C. § 1581(c) (1982).

traded imports to find that dumping injured the domestic industry.

On appeal, the Federal Circuit held that the plain language of 19 U.S.C. § 1673 (1982 & Supp. IV 1986) was unambiguous and supported the lower court's construction. The Federal Circuit stated that as long as Commerce has found that a "class or kind of merchandise" was sometimes sold at dumped prices, "the terms of any individual sale do not matter" for purposes of the ITC's injury analysis. 865 F.2d at 242, App. at 3a.

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit's Decision Permits the Issuance of Antidumping Orders Under Circumstances Never Contemplated by Congress.

On April 12, 1979, ninety-nine nations, including the United States, signed the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade ("GATT").[12] That agreement,

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[12] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 [hereinafter GATT Antidumping Code], *reprinted in Agreements Reached in the Tokyo Round of the Multilateral Trade Negotiations*, H.R. Doc. No. 153, Part I, 96th Cong., 1st Sess. 311-37 (1979) [hereinafter *Tokyo Round Agreements*].

The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, is a multi-lateral agreement whose purpose is to expand world trade by providing for reciprocal tariff reductions and permitting remedies for unfair trade practices, consistent with general principles of free trade. *See generally*, E. McGovern, *International Trade Regulation--GATT, the United States*

commonly referred to as the GATT Antidumping Code, sets forth the circumstances under which signatory nations may impose antidumping duties on imported merchandise. The United States' antidumping law was enacted in 1979 to implement this multilateral agreement.[13]

The GATT Antidumping Code provides that, in conducting the injury determination required by Article VI of the GATT, "it must be demonstrated that the *dumped imports* are [causing injury] through the effects of dumping . . . ."[14] The Code further provides that injury from "other factors," which include "the volume and price of imports not sold at dumping prices," may not be attributed to the dumped imports.[15]

Congress intended that U.S. antidumping law comply with this requirement. The House Ways and Means Committee stated that "material injury must be 'by reason of' . . . less than fair value imports," and that "the volume and prices of imports sold at fair value" is "one of the other factors" that may *not* be the basis for an affirmative injury determi-

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and the European Community (1982); R. Hudec, *The GATT Legal System and World Trade Diplomacy* (1975); K. Dam, *The GATT: Law and International Economic Organization* (1970); J. Jackson, *World Trade and the Law of GATT* (1969).

[13] *Tokyo Round Agreements*, *supra* note 12, at III. *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144, 150-89 (codified as amended at 19 U.S.C. §§ 1673-1677g).

[14] GATT Antidumping Code, *supra* note 12, at art. 3, 31 U.S.T. at 4927, *reprinted in Tokyo Round Agreements*, H.R. Doc. No. 153, at 315 (emphasis added) (footnote omitted).

[15] *Id.*

nation.[16] Similarly, the Senate Finance Committee stated that "an industry must be materially injured 'by reason of' less-than-fair-value imports" and that the volume and prices of imports sold at fair value are "other factors" *not* to be considered by the ITC.[17]

To implement the requirement that injury from fairly traded imports be removed from the ITC's analysis, Congress enacted Section 1673d(b), which provides that in making its final determination, the ITC must decide whether a domestic industry has suffered material injury "*by reason of* imports . . . of the merchandise with respect to which [Commerce] has made an affirmative [dumping] determination . . . ." 19 U.S.C. § 1673d(b) (1982 & Supp. IV 1986) (emphasis added). The Federal Circuit, however, never addressed this statutory provision.[18]

Instead, the Federal Circuit's ruling lets the ITC disregard Commerce's finding that particular imports were fairly traded. Despite the express statements of the House Ways and Means Committee and the Senate Finance Committee to the contrary, the Federal Circuit held that the ITC may base an affirmative determination on the prices and volume of *all* imports—dumped and fairly traded—within the class or kind of merchandise investigated by Commerce.

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[16] H. R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979).

[17] S. Rep. No. 249, 96th Cong., 1st Sess. 74, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 460.

[18] Section 1673(d)(b) is never cited, let alone discussed, in the Federal Circuit's opinion, notwithstanding the fact that it was extensively briefed and argued in both courts below.

Because the Federal Circuit has exclusive jurisdiction over appeals of antidumping cases,[19] no other Court of Appeals will have an opportunity to review this issue. Unless corrected in this Court, the Federal Circuit's erroneous interpretation of the law will govern every antidumping investigation. As a result, numerous final affirmative injury determinations will be issued (and antidumping duty orders entered) based upon a consideration of the prices and volume of both dumped and fairly traded imports, in direct contravention of the GATT Antidumping Code and the intent of Congress. The disruption to U.S. trade caused by such unwarranted and unlawful antidumping duty orders is substantial.

II. The Federal Circuit's Interpretation of the Antidumping Law Is Contradicted by the Statutory Language and Legislative History and Places the United States in Violation of Its International Obligations Under the GATT Antidumping Code.

A. The Statutory Language.

In holding that the ITC may, under the antidumping law, commingle fairly traded and dumped imports, the Federal Circuit stated that "[t]he statute seems to us to speak in plain language and to be unambiguous." 865 F.2d at 242, App. at 4a. The language of the statute, however, is anything but plain.

Section 1673 of the antidumping law states that antidumping duties will be imposed if (1) Commerce finds that "a class or kind of foreign merchandise" is being dumped, and (2) the ITC determines that an "industry in the United States is materially injured

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[19] 28 U.S.C. § 1295(a)(5) (1982).

. . . by reason of imports of that merchandise . . . ." 19 U.S.C. § 1673 (1982 & Supp. IV 1986). Relying on this language, the Federal Circuit held that the ITC may consider the impact of all imports (both dumped and fairly traded) of merchandise of the class or kind defined by Commerce.

Section 1673, however, is a general provision that sets out the circumstances under which antidumping duties are imposed; it does not specifically address the substantive standard the ITC must apply. Instead, it is Section 1673d(b) that sets forth the specific requirements that the ITC must follow in reaching its final determination. Section 1673d(b)(1) provides that, in making its determination, the ITC shall examine "imports . . . of the merchandise with respect to which [Commerce] has made an affirmative determination under subsection (a)(1) of this section." 19 U.S.C. § 1673d(b)(1) (1982 & Supp. IV 1986). Subsection (a)(1), in turn, provides that Commerce shall determine whether "the merchandise which was the subject of the investigation is being . . . sold in the United States at less than its fair value." *Id.* § 1673d(a)(1).

The precise issue of statutory construction before the court below, therefore, was whether the phrase "the merchandise with respect to which [Commerce] has made an affirmative determination" in Section 1673d(b)(1) refers to *all* imports of merchandise of the type covered by Commerce's final determination, or only to those specific imports actually found by Commerce to have been dumped, thereby excluding fairly traded imports. By prematurely terminating its analysis after considering only Section 1673, the Federal Circuit never reached this issue. To the extent Section 1673d(b) requires that the ITC limit its anal-

ysis to dumped imports, it takes precedence over the more general provision of Section 1673.[20] Although the result reached by the Federal Circuit might be plausible if based solely upon the language of Section 1673, the construction urged by Algoma is the only one consistent with the language of Section 1673d(b) and its legislative history.[21]

The significant difference between the wording of Section 1673d(b) and Section 1673b(a), which deals with the ITC's preliminary determination, demonstrates that Section 1673d(b) requires excluding fairly traded imports. 19 U.S.C. § 1673b(a) (1982). The ITC's antidumping injury investigation has two phases. The ITC first conducts a preliminary investigation to determine if there is a "reasonable indication" that the subject imports are a cause of material injury to a domestic industry. If the ITC's preliminary determination is affirmative, Commerce then conducts an investigation to determine if imports were sold at dumped prices. If Commerce issues a final affirmative determination, the ITC then conducts a final investigation of whether such dumped imports are a cause

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[20] A specific statutory provision takes precedence over a more general provision. *E.g., Markair Inc. v. Civil Aeronautics Bd.*, 744 F.2d 1383, 1385-86 (9th Cir. 1984); *Monte Vista Lodge v. Guardian Life Ins. Co. of Am.*, 384 F.2d 126, 129 (9th Cir. 1967), *cert. denied*, 390 U.S. 950 (1968).

[21] The phrase "class or kind of foreign merchandise" in Section 1673 has a qualitative dimension, referring to the particular type of merchandise to be investigated. In contrast, the phrase "the merchandise with respect to which [Commerce] has made an affirmative determination" in Section 1673d(b) has a quantitative dimension, referring to the individual items of merchandise within the class or kind that Commerce in fact had found to be dumped.

of material injury to a domestic industry. *See* 19 U.S.C. §§ 1673b, 1673d (1982 & Supp. IV 1986).

In its preliminary determination, the ITC must presume that all of the imports under investigation are dumped because Commerce has not yet begun its investigation. At the time of the ITC's final determination, however, Commerce's investigation is complete, and its findings are available to the ITC.[22] The statutory language reflects this difference between the two phases. At the preliminary phase, the ITC investigates "imports of *the merchandise which is the subject of the investigation by* [*Commerce*]." At the final stage, however, the ITC considers only the impact of those "imports of the *merchandise with respect to which* [*Commerce*] *has made an affirmative determination* under subsection (a)(1)." *Compare* 19 U.S.C. § 1673b(a) (1982) *with id.* § 1673d(b) (1982 & Supp. IV 1986) (emphasis added). Where Congress, within the same statute, uses expansive language in one provision and more restrictive language in another, it is presumed that the two provisions have different meanings.[23]

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[22] The ITC argued before the Court of International Trade that it cannot use Commerce's finding of which imports were fairly traded because Commerce investigates only a six-month period, while the ITC investigates a three-year period. Transcript of Oral Argument at 37-38. This claim is belied by the fact that in this case the ITC excluded from its three-year period of investigation *all* of the imports of the Canadian producer Welded Tube, based on Commerce's finding that Welded Tube had only fairly traded imports during Commerce's six-month period of investigation. *See supra* note 9.

[23] *Russello v. United States*, 464 U.S. 16, 23 (1983). *See United States v. Naftalin*, 441 U.S. 768, 773-74 (1979). *See also Tafoya*

Finally, construing Section 1673d(b) to require the exclusion of fairly traded imports avoids absurd consequences. Under the statutory construction adopted by the Federal Circuit, even if 99% of all imports investigated by the ITC were fairly traded and only 1% were dumped, the ITC would still include 100% of the imports in its injury analysis.[24]

B. The Legislative History.

The Federal Circuit's interpretation of the antidumping law is directly contrary to Congressional and Executive intent. Where ambiguity exists with respect to the meaning of a statute, a court is obligated to consider relevant legislative history in order to discern the legislative intent. *E.g.*, *Blum v. Stenson*, 465 U.S. 886, 896 (1984). In this case the Federal Circuit ignored language in the legislative history of the antidumping law and in the GATT Antidumping Code that expressly prohibits the imposition of dumping duties where the requisite injury finding is based upon the impact of fairly traded imports.

The current antidumping law was enacted as part of the Trade Agreements Act of 1979, which implements the United States' obligations under the GATT

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v. U.S. Dep't of Justice, 748 F.2d 1389, 1391-92 (10th Cir. 1984); *United States v. Wong Kim Bu*, 472 F.2d 720, 722 (5th Cir. 1972).

[24] Actual antidumping duties will be assessed against only the few imports that were dumped. This does not in any way justify the Federal Circuit's decision, however, because the issuance of the antidumping duty order is itself a major disruption to international trade that affects 100% of the imports covered by the order. *See infra* note 29.

Antidumping Code.[25] The House Ways and Means Committee specified in its report on the Act that the ITC must exclude the effect of fairly traded imports from its injury analysis:

> The bill contains the same causation element as present law, i.e., material injury must be "by reason of" . . . less than fair value imports. In determining whether such injury is "by reason of" such imports, the ITC looks at the effects of such imports on the domestic industry. The law does not, however, contemplate that injury from such imports be weighted against *other factors* (e.g., the volume and prices of . . . *imports sold at fair value*, contraction in demand or changes in patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry) which may be contributing to overall injury to an industry. . . .
>
> Of course, in examining the overall injury being experienced by a domestic industry, *the ITC will take into account evidence presented to it which demonstrates that the harm attributed by the petitioner to the . . . dumped imports is attributable to such other factors.*

H.R. Rep. No. 317, *supra* note 16, at 46-47 (emphasis added).

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[25] Pub. L. No. 96-39, § 101, 93 Stat. 144, 150-89 (1979) (codified as amended at 19 U.S.C. §§ 1673-1677g). *See also Tokyo Round Agreements*, *supra* note 12, at III.

The Senate Finance Committee also intended that the ITC's injury analysis be based solely on dumped imports and that fairly traded imports not be legally germane to this analysis:

> Section 735(b) [19 U.S.C. § 1673d(b)] contains the same causation term as is in current law, *i.e.*, an industry must be materially injured "by reason of" less-than-fair-value imports. . . .
>
> Current law does not, nor will section 735, contemplate that the effects from less-than-fair value the [*sic*] imports be weighed against the effects associated with *other factors* (*e.g.*, the *volume and prices of imports sold at fair value*, contraction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry) . . . .

S. Rep. No. 249, *supra* note 17, at 74, *reprinted in* 1979 U.S. Code Cong. & Admin. News at 460 (emphasis added).

Moreover, because the Trade Act of 1974 required the President to assume an active role in proposing and drafting what became the Trade Agreements Act,[26] and because his legislation was passed without amendment, the President's intent in drafting the antidumping law is vital to its interpretation. *See Zuber v. Allen*, 396 U.S. 168, 192 (1969) (Executive de-

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[26] 19 U.S.C. §§ 2112(d), (e) (1982).

partment's views on legislation are entitled to great weight when it participates in drafting and reporting on legislation to Congress); *Fribourg Navigation Co. v. Commissioner*, 383 U.S. 272, 284 n.13 (1966) (President's address to Congress on proposed legislation considered important aid to interpreting legislation).

The President, in proposing that Section 1673d be enacted, stated to Congress:

> In determining whether material injury is "by reason of" . . . *dumped imports*, the Commission will look at the effects of *such* imports on the domestic industry. . . .
>
> While a determination of material injury by reason of . . . *dumped imports* does not involve a weighing of the various factors which may, at the same time, be adversely affecting the domestic industry, it is expected that the Commission will consider such information as is presented to or obtained by it which may demonstrate that the harm attributed by the petitioner to the . . . dumped imports is attributable to *other factors*. Such other factors can include, *inter alia*, the volume and prices of . . . *imports not sold at less than fair value*, contraction in demand or changes in patterns of consumption, trade restrictive practices or competition between the foreign and domestic producers, and export performance and productivity of the domestic industry.

Trade Agreements Act of 1979, Statements of Administrative Action, H.R. Doc. No. 153, Part II, 96th Cong., 1st Sess. 388, 434-435, *reprinted in* 1979 U.S.

Code Cong. & Admin. News 665, 700 (emphasis added).

By failing to consider this critical legislative history, the Federal Circuit ignored the central premise of the antidumping law as expressly intended by Congress and the President: antidumping duties may be imposed only when material injury is caused by *dumped* imports. The Federal Circuit's conclusion that the law permits the ITC to consider the effect of fairly traded imports contradicts this expressed intent.

C. The GATT Antidumping Code.

Because the antidumping law was drafted by the President to implement the GATT Antidumping Code, it is no accident that the law's language tracks the Code. Furthermore, as noted by both courts below, Congress intended that the antidumping law be interpreted consistent with the Code. *See* 865 F.2d at 242, App. at 4a; 688 F. Supp. at 645n.6, App. at 17a n.6. The Federal Circuit's decision, however, needlessly results in a construction of the antidumping law that directly conflicts with the Code.

Article 3 of the GATT Antidumping Code expressly forbids the commingling of dumped and fairly traded imports:

> It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code. There may be other factors* which at the same time are injuring the industry, and *the injuries caused by other factors must not be attributed to the dumped imports.*

GATT Antidumping Code, *supra* note 12, at art. 3, 31 U.S.T. at 4927, H.R. Doc. No. 153, at 315 (emphasis added) (footnote omitted). The footnote to this section makes clear that fairly traded imports are among the "other factors" that may *not* be considered a cause of injury:

> * Such factors include, *inter alia*, the *volume and price of imports not sold at dumping prices*, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

31 U.S.T. at 4927 n.5, H.R. Doc. No. 153, at 315 n.2 (emphasis added). The GATT Antidumping Code thus provides that the volume, prices and other effects of fairly traded imports are "other factors" that must not be attributed to the dumped imports.[27]

Although the language of the GATT Antidumping Code addresses the issue in this case in unambiguous terms, the Court of International Trade incorrectly determined that the Code provides only a "broad outline" that does not necessarily conflict with the ITC's construction of the law. 688 F. Supp. at 644-45, App. at 16a-17a. The Federal Circuit merely stated:

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[27] The text of the GATT Antidumping Code's prohibition against consideration of the effects of fairly traded imports and, in particular, the text of the note quoted above were inserted, virtually verbatim, by the President, the House Ways and Means Committee and the Senate Finance Committee in the legislative history of the antidumping law. *See supra* text accompanying notes 25-26.

> We have also considered the General Agreement On Tariffs and Trade (GATT). Congress no doubt meant to conform the statutory language to the GATT, but we are not persuaded it embodies any clear position contrary to ours.

865 F.2d at 242, App. at 4a.

The Federal Circuit is plainly wrong. The GATT Antidumping Code specifically prohibits the commingling of dumped and fairly traded imports. The Federal Circuit, however, expressly held in this case that such commingling is proper under the antidumping law. The conflict could not be more self-evident. In light of the unique history of the Trade Agreements Act, the failure of both courts below to reconcile their construction of the antidumping law with the above-quoted language in the GATT Antidumping Code is itself a sufficient ground for review by this Court.

To be sure, if the antidumping law conflicts with the GATT Antidumping Code, the former controls. 19 U.S.C. § 2504(a) (1982). The Federal Circuit, however, ignored the strong presumption that the antidumping law should be construed to avoid conflict with the GATT Antidumping Code. *Phillipp Brothers, Inc. v. United States*, 10 CIT 76, 84 n.13, 630 F. Supp. 1317, 1325 n.13 (1986). *Accord United States Steel Corp. v. United States*, 9 CIT 453, 457, 618 F. Supp. 496, 501 (1985). The interpretation of an act of Congress and an international treaty should be harmonized wherever possible. *See Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Payne*, 264 U.S. 446, 448 (1924); *Chew Heong v. United States*, 112 U.S. 536, 548-49 (1884). The Federal Circuit failed to do so in this case. Instead of harmonizing the anti-

dumping law with the GATT Antidumping Code, the Federal Circuit needlessly created a direct conflict.

D. The Adverse Impact on International Trade.

The fair and efficient operation of the United States' unfair trade laws—one of the most significant of which is the antidumping law—has taken on increasing importance in this time of heightened domestic and foreign tensions over international trade. Today there are in force 167 antidumping duty orders covering 39 countries. These orders apply to virtually every kind of merchandise, from salted codfish to computer disks. Fifty-four additional antidumping investigations covering twelve countries are currently pending. Furthermore, the domestic steel industry has announced that it is considering filing hundreds of new antidumping cases against all imported steel products from every major steel producing nation.[28]

Unless this Court corrects it, the Federal Circuit's erroneous interpretation of such a fundamental element of the antidumping law will cause a significant and inequitable disruption to the international trade of this nation. The law seeks to protect domestic industries from price discrimination by foreign competitors, while affording no protection from fairly traded imports. In this way the law minimizes the disruption to international trade while ensuring that the United States is in full compliance with its international obligations under the GATT Antidumping Code.

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[28] Washington Post, Feb. 9, 1989, at E1, col. 2. The logistical and procedural aspects of these expected steel cases were the subject of a recent Commerce hearing. *Possible Certain Steel Products Investigations*, 54 Fed. Reg. 6158 (Dep't Comm. 1989).

An antidumping duty order, even when lawfully issued, creates a serious and substantial burden on U.S. trade. Such an order, with its attendant commercial uncertainties—including the indefinite suspension of the determination of an importer's antidumping duty liability—can itself cause significant commercial harm to U.S. importers and foreign producers.[29] "Withholding of appraisement [*i.e.*, suspension of final duty liability] necessarily creates uncertainty. It is a major deterrent, often more feared than the imposition of the duty." *Hearings Before the House Committee on Ways and Means on H.R. 6006, 6007, and 5120, Bills to Amend Certain Provisions of the Antidumping Act of 1921*, 85th Cong., 1st Sess. 30, 40 (1957) (testimony of then-Assistant Secretary of the Treasury David W. Kendall). Antidumping duty orders issued without a lawful basis create the same serious disruption to

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[29] Under an antidumping duty order, importers must deposit in cash *estimated* antidumping duties on all merchandise covered by the order at the time imports are formally entered into the United States at the Customs port. Estimated duties, which in some cases can be so prohibitively high as to effectively block future imports, are based upon the weighted average *ad valorem* rate of dumping determined during Commerce's investigation. Final assessment of antidumping duties is suspended until Commerce conducts annually an "administrative review" of the order and determines the amount of antidumping duties owed on an entry-by-entry basis (or the time for requesting such a review expires). *See* 19 U.S.C. § 1675 (1982 & Supp. IV 1986). This may not take place until more than two years after the goods enter the United States. Final assessment may be delayed even longer if the results of the annual review are challenged in court. The amount finally assessed may be higher or lower than the estimated antidumping duties deposited at the time of entry. Importers thus face an unlimited contingent liability if they import merchandise subject to an antidumping duty order.

trade, but without furthering the goals embodied in the antidumping law.

The Federal Circuit's erroneous decision in this case destroys the antidumping law's careful balance between preventing unfair trade and encouraging fair trade. By effectively reading out of the law the requirement that, to be remediable, injury must be caused by *dumped* imports, the Federal Circuit has cleared the way for the issuance of numerous unlawful and unwarranted antidumping duty orders.

CONCLUSION

For the reasons stated above, this Court should grant Algoma's Petition for a Writ of Certiorari to review the issues presented herein.

Respectfully submitted,

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May 4, 1989

APPENDIX

United States Court of Appeals
for the Federal Circuit

88-1491

THE ALGOMA STEEL CORPORATION, LIMITED,
Plaintiffs-Appellants,

CHRISTIANSON PIPE, LTD., IPSCO, INC.
and IPSCO STEEL, INC.,
Plaintiffs,

v.

THE UNITED STATES and U.S. INTERNATIONAL TRADE COMMISSION,
Defendants-Appellees,

LONE STAR STEEL COMPANY, MAVERICK TUBE CORPORATION, SAWHILL TUBE DIVISION and CYCLOPS CORPORATION,
Defendants.

DECIDED: January 4, 1989

Before MAYER, *Circuit Judge*, NICHOLS, *Senior Circuit Judge*, and MICHEL, *Circuit Judge*.

NICHOLS, *Senior Circuit Judge*.

This is a proceeding under 28 U.S.C. § 1295(a)(5) to review a decision of the United States Court of International Trade, 688 F. Supp. 639, 22 Cust. B. & Dec. 13 (1988), which affirms a determination of the International Trade Commission (ITC) which holds that the sales at less than fair value (LTFV or "dumping") of certain steel prod-

ucts, oil country tubular goods (OCTG) from Canada, injure or threaten injury to an industry in the United States. In the case of appellant Algoma Steel Corporation, a Canadian producer, the Department of Commerce had previously determined that, over a six-month period studied, such sales occurred, but it is undisputed that they were slightly under 50 percent of all United States sales Algoma made. Algoma had a printout made of the data establishing this, but the ITC refused to receive or consider it, holding that for purposes of its injury determination, sales at more than fair value (MTFV) were not to be excluded. The Court of International Trade rejected Algoma's assertion that this was legal error, as do we. That is the sole issue in the appeal, and our view of it requires that we affirm.

I

In the intricate administrative machinery Congress has erected over the years for dumping and countervailing duty cases, one unique feature is the allocation of responsibility to two agencies otherwise independent of one another, the Commerce Department and the ITC, the requisite injury determination for the latter, and everything else for the former. Naturally the specifics as to who does what is for dispute and discussion. Commerce, determining that sales at LTFV have occurred, normally makes no finding as to what percentage of all sales they are, but rather and in lieu thereof, states a "dumping margin" which is a weighted average adjusting appropriately for the MTFV sales. The ITC says it is not told how many or which the MTFV sales were and the raw data that was before the Commerce Department is of no use to it because its injury determination covers a different time frame. This kind of issue should be one for the agencies to resolve between themselves, and not for the courts. We think we should confine our consideration to the ultimate product: is an injury determination, not confined

to the LTFV sales alone, arbitrary, capricious, or otherwise contrary to the law? We hold it is not.

As Clausewitz, the sapient Prussian general, once wrote, "the object of war is peace." Likewise, the object of sales at LTFV is other sales at MTFV. Many such sales might be the best evidence possible that the LTFV sales had served their purpose and the United States competitor was in full retreat. It is, therefore, not at all obvious that the MTFV sales are *per se* legally irrelevant. They might be irrelevant as a practical matter in some instances, but that would have to be shown, and no such showing has even been attempted here. The whole issue is presented as one of *per se* legality or illegality.

The statute seems to us to speak in plain language and to be unambiguous. Section 731, 19 U.S.C. § 1673 says:

> If—
>
> (1) the administering authority determines that a *class* or *kind* [emphasis supplied] of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty, * * *.

If a "class or kind" of that merchandise is sometimes sold at LTFV, the terms of any individual sale do not matter. Here Commerce told the ITC that a class or kind of goods,

namely OCTG, was being so sold. It seems quite apparent that any one sale by the foreign producer, Algoma, or any other foreign producer, is one less for the domestic industry, and to that extent whether it is over or under fair value is immaterial but, of course legal injury, unlike economic, is a concept requiring some admixture of wrong doing. Some LTFV sales must be found, but if they occurred, the ITC is not required to pursue details as to the chain of causation of every instance where the foreign supplier supplanted the domestic one.

Appellant cites some legislative history and we have considered the citations, but the instances given probably do not stem from as careful consideration as does the statutory language itself, nor is it obvious the writers adverted to, and intended to discuss, instances of sales at LTFV and MTFV by the same foreign supplier in the same period of six months. On the other hand, appellee refers to its own administrative practice, unbroken since the enactment of the present law, as consistent with its position in this case. This would require more detailed consideration if the statutory language were not so plain but, at any rate, there is nothing there to undermine our position.

We have also considered the General Agreement on Tariffs and Trade (GATT). Congress no doubt meant to conform the statutory language to the GATT, but we are not persuaded it embodies any clear position contrary to ours. Should there be a conflict, the United States legislation must prevail. 19 U.S.C. § 2504(a).

Thus, it is not arbitrary, capricious, or contrary to law for the ITC to refuse to consider a computer printout showing the breakdown of Algoma's sales during a six-month period between LTFV and MTFV sales. The period, incidentally, is one as to which entries will normally have been liquidated, so any assessment of dumping duties that ensues will not have any significant impact on the parties' businesses in that period.

This is not to say that a similar printout might not justify consideration if the raw data were supported by reasons specific to the particular case, why sales at MTFV were not relevant to the injury determination. It is only the appellant's *per se* rule that we reject. We are also of course not saying that the sales of the class or kind at MTFV and at LTFV are *per se* of equal probative value, so any distinction between them would be unwarranted however supported by the facts.

II

Appellant seeks to discredit the opinion of the trial court by citation and discussion of a decision by Judge Newman of that court, *Sprague Electric Co.* v. *United States*, 488 F. Supp. 910, 84 Cust. Ct. 243 (1980), twice revisited by that Judge, 84 Cust. Ct. 260 (1980), and 529 F. Supp. 676, 2 CIT 302 (1981). This was a challenge by an American producer to a negative injury determination, the converse to the case we have here. One issue was the correctness of the ITC in that case having confined its consideration to sales at LTFV, excluding all others. Naturally, the American producer wanted all of them considered. Judge Newman, rejecting this point, seems to say the ITC would be guilty of legal error if it *refused* to exclude the LTFV sales. His *result* would perhaps be consistent with ours, as we are inclined to think there is no *per se* rule either way, but reluctantly we acknowledge his language does conflict with our view. We could stop with the obvious, that an appellate court is not bound by what a trial court says the law is, even in the same case, still less another one. The parties and the trial court, in this case, lay so much stress on their discussion of *Sprague Electric*, however, perhaps we should say more than the obvious.

In the first place, then, it is asserted the second and third *Sprague Electric* decisions overturned *sub silentio* the conclusion we have found stated in the first, since Judge

Newman ended up affirming later determinations of the ITC that he could not but have known (it is said) were based on all the sales of the class or kind involved, not just the LTFV sales. When, however, it is as here a matter of *stare decisis*, not *res judicata* or collateral estoppel, any legal conclusion not expressed in words is of small precedential authority, if any.

In the second place, the Trade Agreements Act of 1979, which reenacted as 19 U.S.C. § 1673 the 1921 provision originally codified as 19 U.S.C. § 160, did so before the first Newman decision and therefore cannot possibly be presented as reenacting a provision which has received a judicial construction. The dates are wrong. The administrative constructions seem to have been conflicting.

In the third place, we do not think the decisions of the Customs Court are relegated to being, as precedents, decisions of a predecessor court to the Court of International Trade, in the same way decisions of the old Court of Claims and Court of Customs and Patent Appeals are to us. They are decisions of the same court. Judge Restani, in the decision under review, rightly calls the Customs Court "This court." It is nowhere spelled out in the Custom Courts Act of 1980, Pub. L. No. 96-417, but is implicit in section 703(a) that the status of individuals serving as Customs Court judges is not affected, and section 704 that actions pending under the old law shall continue to be processed.

However, among trial courts it is unusual for one judge to be bound by the decisions of another and, if it is to occur, such a rule should be stated somewhere. That is not done here; with all the criticism directed by appellants towards Judge Restani for not following Judge Newman, nowhere is anything pointed out saying she must. She, herself, accepts an analysis of Judge Newman's decisions as precedents which we deem in part mistaken, but she is right in making her own decision nevertheless.

Conclusion

The decision of the Court of International Trade which is appealed from is affirmed.

AFFIRMED

Slip Op. 88- 74

UNITED STATES COURT OF INTERNATIONAL TRADE

86-07-00839

THE ALGOMA STEEL CORP., LTD.,
and CHRISTIANSON PIPE, LTD.,
Plaintiffs,

and

IPSCO, INC., and IPSCO STEEL, INC.,
Plaintiff-Intervenors,

v.

THE UNITED STATES and
INTERNATIONAL TRADE COMMISSION,
Defendants,

and

LONE STAR STEEL CORPORATION,
MAVERICK TUBE CORPORATION, and
SAWHILL TUBE DIVISION, CYCLOPS CORP.
Defendant-Intervenors.

[Judgment for defendants.]

Dated: June 8, 1988

Dow, Lohnes & Albertson (William Silverman, Leslie H. Wiesenfelder, and *Michael P. House)* for plaintiffs.

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr., Matthew J. Clark, Karin M. Burke) for plaintiff-intervenors.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Assistant General Counsel and *(Paul R. Bardos),* United States International Trade Commission, for defendants.

Dewey, Balantine, Bushby, Palmer & Wood (Michael H. Stein) for defendant-intervenor Lone Star Steel Co.

OPINION

RESTANI, Judge: This matter is before the court on plaintiffs' motion for judgment upon the agency record. The decision before the court for review is the International Trade Commission (ITC) final determination that an industry in the United States is materially injured by reason of less than fair value (LTFV) imports in *Oil Country Tubular Goods from Canada*, USITC Pub. 1865, Inv. No. 731-TA-276 and 277 (Jun. 1986).

The single issue before the court is whether ITC erred in assessing the volume of LTFV imports, and their impact on injury, by failing to take account of the fact that some sales of Oil Country Tubular Goods [OCTG] from non-excluded Canadian companies were at fair value. The relevant facts are as follows:

One of the plaintiffs, Algoma Steel Corporation, a producer and exporter of OCTG, was assigned a weighted average dumping margin of 13 percent by the International Trade Administration of the Department of Commerce (ITA). The other plaintiff, Christianson Pipe, an exporter, was assigned the 16.65 percent weighted average margin of the "all other" category. 51 Fed. Reg. 29,579 (Aug. 19, 1986). The weighted average is derived by ITA from all sales, both LTFV and fair value, during a six month period.[1] In this case, ITA provided ITC with its final conclusion as to which companies had positive dumping margins. ITA did not advise ITC which sales it found to be at LTFV, nor did it state the overall LTFV sales

[1] For example, assume three sales from a particular company during the relevant period. One hundred units are sold at 100 percent LTFV, two hundred units are sold at fair value and another one hundred units are sold at 50 percent LTFV. The weighted average margin, which takes into consideration the volume of fair value sales, is 37.5 percent.

percentage figure for each company. Though ITC may request such information if it finds it necessary to its decision-making, *see* 19 U.S.C. § 1673a(d)(2) (1982), it did not make such a request here. Plaintiffs, however, did place certain information of this type in the record under review. Confidential Record Document No. 35 at app. 2. Based on this information, plaintiffs assert that less than half of all sales of OCTG from Canada (by volume) during ITA's investigation period were at LTFV. In determining the volume of LTFV imports, ITC included in its volume figures all sales of OCTG from Canada, except those made by an excluded company.[2]

Plaintiffs argue generally that ITC should have undertaken a sale by sale analysis so as to make the best possible determination of whether injury is the result of LTFV sales. According to plaintiffs, this type of analysis would indicate whether particular U.S. sales are lost to LTFV sales of imports. Failing this, plaintiffs argue that ITC at least should adjust its volume data to reflect that only a portion of sales were at LTFV.

Plaintiffs make four specific arguments. First, that ITC's determination of injury is based on fairly traded imports contrary to the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (1979 Act) and the Antidumping Code of the General Agreement on Tariffs and Trade (GATT).[3] Second, that Congress intended ITC to continue its pre-1980 practice of segregating LTFV and fairly traded imports. Third, that ITC's methodology renders the determination unsupported by substantial evidence because it creates an erroneous presumption that

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[2] ITA excludes from its determination sales from any company whose LTFV weighted average margin is considered *de minimis*, that is, according to ITA, less than .05 percent.

[3] Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 (GATT Antidumping Code).

all sales were at LTFV, and fourth, that ITC's policies of excluding companies with *de minimis* LTFV sales and excluding certain sales it deems "the equivalent of fairly traded" are inconsistent with its methodology here.

The court deals first with an aspect of the fourth argument that seems to be based on a clearly erroneous assumption. That is, plaintiffs assume that ITC excludes certain companies, found by ITA to have zero or *de minimis* LTFV sales, from its investigation. ITC, in fact, excludes no such companies. It is ITA which follows a policy of excluding from its determination companies with zero or *de minimis* LTFV margins. Thus, ITC has no policy of its own on this point with which it could be inconsistent. In any event, assuming *arguendo* that ITC and ITA should be consistent, there appears to be nothing more inconsistent about ITA excluding a particular company and ITC considering all sales of non-excluded companies than there is in establishing a *de minimis* rate or an exclusion policy in the first place. Plaintiffs do not challenge these somewhat arbitrary procedures. They are beneficial to plaintiffs, they assist ITA, and they may be fair.

It should also be noted that possibilities for ITA and ITC inconsistencies are built into the law. The very fact of separation of the two parts of the decisions required by the unfair trade laws may lead to superficial inconsistencies. As long as the inconsistencies resulting from the plain language of the statute do not lead to results which Congress could not have intended, they should be tolerated. *See infra* discussion of the applicable statutory language.

Plaintiffs also argue that ITC's methodology in this case is inconsistent with its own practice of excluding sales that it deems the "equivalent of fairly traded"—namely imports already subject to an antidumping order. Plaintiff's Brief at 42-44 (citing *Color Picture Tubes from Canada, Japan, the Republic of Korea and Singapore*, USITC Pub. 1937,

Inv. No. 731-TA-367-370 (Jan. 1987) and *Cold Rolled Carbon Steel Plates and Sheets from Argentina*, USITC Pub. 1967, Inv. No. 731-TA-175 (Mar. 1987)).

The court finds no such inconsistency. ITC's practice of excluding certain imports already subject to an antidumping order is based on the reasonable assumption that the injurious effect of those imports has been negated by the imposition of dumping duties. That such imports are considered "fairly traded" by ITC, however, does not support the general proposition put forth by plaintiffs, that ITC must exclude from its analysis all non-LTFV sales made by a company under investigation. A practice of treating *all* imports subject to an outstanding antidumping duty order as fairly traded is distinguishable from a practice which would require ITC to segregate individual LTFV and fair value sales.

As to plaintiff's second argument, the court does not find Congressional ratification of ITC's prior practice. Plaintiffs argue that Congress was made aware of a consistent prior practice by the testimony of Russell N. Shewmaker in *Hearings Before the Subcommittee on Trade of the House Committee on Ways and Means*, 98th Cong., 1st Sess. 1119, 1178-1179 (1983). The court has reviewed this testimony and found little which might alert Congress to ITC's particular practices. The legislative history of the 1979 Act does contain the following statement:

> Section 735(b) contains the same causation term as is in current law, *i.e.*, an industry must be materially injured "by reason of" less-than-fair-value imports. The current practice by the ITC with respect to causation will continue under Section 735.

S. Rep. No. 249, 96th Cong., 1st Sess. 74, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 460. This seems to be nothing more than a paraphrasing of the statute itself. The court has found in the past that ordi-

narily Congress does not, by such general statements, attempt to direct the specifics of ITC's causation methodology and Congress is specific when it actually intends to remove agency discretion in this area. *See USX Corp. v. United States*, 11 CIT ___, 655 F. Supp. 487, 496 (1987) (discussion of the Trade and Tariff Act of 1984).

Even assuming that Congress actually meant to ratify consistent agency practices, it is unclear that at the time of the 1979 Act a consistent practice existed. It does seem clear that ITC had at one time a practice of requesting or receiving LTFV sales data, and it sometimes based its decision on the volume of LTFV sales rather than total volume of sales by the companies found to have positive margins. *See, e.g., Butadiene Acrylonitrile Rubber from Japan*, USITC Pub. 764, Inv. No. AA1921-151 (Mar. 1976). As the 1979 Act approached, however, there were many occasions on which ITC based its decision on total import volumes, as was done here, without differentiating between LTFV and fair value sales. *See, e.g., Polyvinyl Chloride Sheet and Film from the Republic of China*, USITC Pub. 879, Inv. No. AA1921-178 (Apr. 1978). (Percentage of LTFV sales were noted merely as a factor in ITA's computation of weighted average.) Accordingly, the court finds that ITC's pre-1979 Act practice was not consistent.

Plaintiffs next argue that their view has already been adopted by this court in *Sprague Electric Co. v. United States*, 84 Cust. Ct. 243, 488 F. Supp. 910 (1980) (*Sprague I*). In that case, ITC omitted from its consideration of threat of material injury a company which had no LTFV sales during the investigated period. The court sustained this determination. On rehearing, however, the court determined that ITC could not exclude from the defined class of imports sold at LTFV, imports of a company which the administering agency had not excluded from its determination. *Sprague Electric Co. v. United States*, 84 Cust. Ct. 260, 261-62 (1980) (*Sprague II*). In *Sprague I* the court also upheld ITC's determination, *Tantalum Electrolytic*

Fixed Capacitors from Japan, USITC Pub. 789, Inv. No. AA1921-159 (Oct. 1976), to consider only the volume of sales which were actually at LTFV. This issue was not addressed on rehearing, but after *Sprague II* the case was remanded. Although the court stated that it was adhering to its original determination except on the exclusion issue, following remand ITC appears to have read *Sprague II* as an indication that it should consider the full volume of sales. *See Tantalum Electrolytic Fixed Capacitors from Japan*, USITC Pub. 1092, Inv. No. AA1921-159 (Aug. 1980) at 4. This decision was affirmed in *Sprague Electric Co. v. United States*, 2 CIT 302, 310-13, 529 F. Supp. 676, 682-84 (1981) (*Sprague III*). Because the determination under review was negative, the methodology at issue here was probably not of concern to the court in *Sprague III*, so that one cannot read *Sprage III* as a clear rejection of the relevant holding in *Sprague I*.

If *Sprague I* can still be read to support plaintiffs' position, the court must nonetheless consider the difference between the language of the Antidumping Act of 1921, which applied in that case, and the language of the current statute. The language of the current statute is more specific in its reference to imports which are the subject of the LTFV determination. *Compare* 19 U.S.C. § 1673d(b) (1982 & Supp. IV 1986) *with* § 201 of the Antidumping Act of 1921, ch. 14, 42 Stat. 11 (repealed 1979) (formerly codified, as amended, at 19 U.S.C. § 160(a) (1976)). One might speculate as to whether the *Sprague I* court would find ITA's current methodology an acceptable interpretation of the amended language, but such speculation would not render a conclusive answer. Given the confusing history of the *Sprague* case and the change in statutory language, the court cannot say that the issue now before the court has been resolved previously in plaintiffs' favor.

Most important to the resolution of this dispute, and perhaps most difficult to resolve, is the issue of what is intended by the words of the current statute. The statute

currently provides that ITC shall determine whether an industry in the United States in injured "by reason of imports . . . of the merchandise with respect to which the administering authority has made an affirmative determination. . . ." 19 U.S.C. 1673d(b) (1982 & Supp. IV 1986). It also provides in relevant part that:

> If—
>
> (1) [ITA] determines that class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) [ITC] determines that—
>
> (A) an industry in the United States
>
> (i) is materially injured . . . by reason of imports of that merchandise . . . then there shall be imposed upon such merchandise an antidumping duty. . . .

19 U.S.C. § 1673 (1982 & Supp. IV 1986).

In applying this statute, ITC does not look behind ITA's determination, but accepts ITA's determination as to which merchandise is in the class of merchandise sold at LTFV. ITC, on the other hand, determines what domestic industry produces products like the ones in the class defined by ITA and whether that industry is injured by the relevant imports. This division of labor has been upheld even where it has resulted in decisions which are difficult to reconcile, as when the class of merchandise found by ITA to be sold at LTFV affects several industries, not all of which are found by ITC to be materially injured. *See Badger-Powhatan Div. of Figgie Int'l. v. United States*, 9 CIT 213, 608 F. Supp. 653 (1985) and 10 CIT ___, 633 F. Supp. 1364 (1986). The division of labor cannot be ignored. *American Permac, Inc. v. United States*, 10 CIT ___, 656 F. Supp. 1228 (1986) *aff'd* 831 F.2d 269 (Fed. Cir. 1987).

ITC has wide latitude in deciding whether imports of the merchandise in the class defined by ITA are causing

material injury. The court sees no reason to compel it to view sales by sales data and attempt to match up LTFV sales with evidence of lost U.S. sales. In this case, the court need not resolve the issue of whether ITC may do this, but in few cases would ITC be justified in stopping there, as by statute it must look at volume and price effects, as well as the impact of imports on the domestic industry. 19 U.S.C. § 1677(7) (1982 & Supp. IV 1986).[4]

The court next turns to plaintiffs' more credible claim, that ITC should be compelled to make a determination of what percentage of import volume represents LTFV sales and to consider this data. Presumably, ITC would do this by multiplying each year's import volume by the percentage of LTFV sales found by ITA to have been made during its six-month investigatory period. Plaintiffs' best argument is that failure to so adjust volume figures means that ITC is likely to have assessed injury based on some sales that were not at LTFV. At first glance this would seem to run afoul of GATT.[5]

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[4] Furthermore, looking at six months of the sales data considered by ITA is not going to give ITC the three years of broad data it needs to meet the statutory test.

[5] Article 3 of the GATT Antidumping Code states in relevant part:

> It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code. There may be other factors* which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.
>
> ---
>
> *Such factors include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

31 U.S.T. at 4927 (citation omitted).

Defendant's response is that GATT provides only a broad outline and the statute specifically looks to imports in the *class* found by ITA to be sold at LTFV as the way of determining whether a domestic industry is injured by dumping. This view has merit.

In this case, ITA has defined an entire class based on six months of data. It is the volume of imports attributable to that class that is most relevant to ITC. Plaintiffs' basic misunderstanding is reflected in their continual use of the phrase "LTFV sales" as if the statute says that ITC must find that injury is attributable to particular sales found to be at LTFV. The statute refers instead to imports which are sold at LTFV. ITC is basing its decision on the affects of relevant imports from companies determined to have sold the subject merchandise at LTFV. Obviously, it is unlikely that every sale is a LTFV, and Congress may be presumed to have perceived this.

Whatever the ideal embodied in GATT, Congress has not simply directed ITC to determine directly if dumping itself is causing injury. *Cf. Hyundai Pipe Co. v. United States*, 11 CIT ___, 670 F. Supp. 357 (1987) and *Maine Potato Council v. United States*, 9 CIT 293, 613 F. Supp. 1237 (1985). (Both finding ITC need not consider dumping margins.) Perhaps Congress believed that such a standard was not sufficiently specific or that it involved a type of analysis that was unworkable. In any case, Congress opted to direct ITC to determined if imports of a specific class of merchandise, determined by ITA to have been sold at LTFV, are causing injury. This seems to be Congress' way of implementing GATT.[6]

Given the complexities of determining if dumping is causing injury, it is difficult to say that an interpretation

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[6] Consistency with GATT was an object of the 1979 Act. *See Statement of Administrative Action for the Trade Agreements Act of 1979*, H.R. Doc. No. 153, Part II, 96th Cong., 1st Sess. 388, 389-393 (1979) *reprinted in* 1979 U.S. Cong. Code & Admin. News, 665, 666-68.

the statute that directs ITC to focus on the effects of relevant imports from companies determined to have sold the subject merchandise at LTFV, rather than on the effects of a volume of sales deemed to be at LTFV, conflicts with GATT. Thus, the real question addressed to ITC by the statute is what effect imports in a class of merchandise sold at LTFV have on the domestic industry producing the "like" product. Adjusting volume data as plaintiffs would wish does not answer this question.[7]

Finally, plaintiffs raised at oral argument the "horrible example" of a particular company with only one or two percent of its sales at LTFV. Assuming *arguendo* that one could still have an affirmative dumping margin at such low levels, in any review of an agency determination the issue is one of the reasonableness of the decision under the law. If, despite its statutory design, Congress did not intend the statute to be interpreted or applied to impose duties where dumping could not be the cause of injury, one might argue that ITC should consider evidence of an extremely low percentage of sales at LTFV, if requested to do so.[8] This, however, is not a case of a few LTFV sales but of LTFV sales as a substantial percentage of all sales. It is also a case of substantial margins. Under these circumstances, the court need not resolve these issues and it finds no reason to compel ITC to determine what percentage of the total volume of imports in the class defined by ITA represents LTFV sales.[9]

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[7] It should also be noted that *Hyundai* did permit margins analysis. As the weighted margin is adjusted for whatever volume of sales is at or above fair value, to compel ITC to adjust volume figures to eliminate sales that are at fair value and then to permit it to apply margins analysis would be a form of double counting.

[8] This scenario presents the issue of whether Congress intended to permit GATT inconsistency in this area.

[9] Plaintiff recently has sought to file a supplemental brief. The court has read it and finds it unpersuasive in regard to the issue at hand.

ITC's methodology in this case does not conflict with statutory language or intent and is reasonable.

/s/ Jane A. Restani
Jane A. Restani
JUDGE

Dated: New York, New York
This 8th day of June, 1988.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

Investigations Nos. 701-TA-255 (Final)
and 731-TA-276-277 (Final)

OIL COUNTRY TUBULAR GOODS FROM CANADA AND TAIWAN

Determinations

On the basis of the record[1] developed in the subject investigations, the Commission determines,[2] pursuant to section 705(b) of the Tariff Act of 1930 (19 U.S.C. § 1671d(b)), that an industry in the United States is materially injured by reason of imports from Canada of oil country tubular goods,[3] provided for in items 610.32, 610.37, 610.39, 610.40, 610.42, 610.43, 610.49, and 610.52 of the Tariff Schedules of the United States, which have been found by the Department of Commerce to be subsidized by the Government of Canada.

Further, the Commission determines,[2] pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)), that an industry in the United States is materially injured

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[1] The record is defined in sec. 207.2(i) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(I)).

[2] Vice Chairman Liebeler and Commissioner Brunsdale determine that an industry in the United States is not materially injured or threatened with material injury by reason of imports from Canada which are being subsidized, or by reason of imports from Canada and Taiwan which are being sold in the United States at LTFV.

[3] For purposes of these investigations, the term "oil country tubular goods" includes drill pipe, casing, and tubing for drilling oil or gas wells, of carbon or alloy steel, whether such articles are welded or seamless, whether finished or infinished, and whether or not meeting American Petroleum Institute (API) specifications, provided for in items 610.32, 610.37, 610.39, 610.40, 610.42, 610.43, 610.49, and 610.52 of the Tariff Schedules of the United States.

by reason of imports from Canada and Taiwan of oil country tubular goods,[3] provided for in items 610.32, 610.37, 610.39, 610.40, 610.42, 610.43, 610.49, and 610.52 of the Tariff Schedules of the United States, which have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

Background

The Commission instituted these investigations effective December 30, 1985, following preliminary determinations by the Department of Commerce that imports of oil country tubular goods from Canada were being subsidized within the meaning of section 701 of the Act (19 U.S.C. § 1671) and that imports of oil country tubular goods from Canada and Taiwan were being sold at LTFV within the meaning of section 731 of the Act (19 U.S.C. § 1673). Notices of the institution of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notices in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notices in the *Federal Register* of January 24, 1986 (51 FR 3270) and of March 19, 1986 (51 FR 9540). The hearing was held in Washington, DC, on May 6, 1986, and all persons who requested the opportunity were permitted to appear in person or by counsel.

VIEWS OF CHAIRWOMAN STERN, COMMISSIONER ECKES, COMMISSIONER LODWICK, AND COMMISSIONER ROHR

We determine that an industry in the United States is materially injured by reason of subsidized imports of oil country tubular goods from Canada. We also determine that an industry in the United States is materially injured by reason of imports of oil country tubular goods from Canada and Taiwan, which are being sold at less than fair value (LTFV).[1]

These determinations are based primarily on the poor financial performance of the domestic industry, the significant and increasing market penetration of cumulated imports, and the adverse effect of imports on the prices of the domestic product during the period under investigation.[2]

Like product/domestic industry

The statutory framework under which the Commission conducts title VII investigations requires the Commission first to determine the domestic industry against which to assess the impact of unfairly traded imports.[3]

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[1] Although Vice Chairman Liebeler and Commissioner Brunsdale find in the negative for these investigations, they join in the discussion of the like product/domestic industry and the condition of the domestic industry. Commissioner Brunsdale also joins in the discussion of cumulation. *See* their separate views for their reasons for reaching negative determinations.

[2] Material retardation of the establishment of an industry in not at issue in these investigations and will not be discussed further.

[3] Section 771(4)(A) of the Tariff Act of 1930 defines the term "industry" as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product." 19 U.S.C. § 1677(4)(A). "Like product" is defined in section 771(10) as "a product which is like, or in the absence of like, most similar in

The imported product in these final investigations is oil country tubular goods (OCTG), which includes casing, tubing, and drill pipe for use in drilling oil and gas wells and for transporting oil and gas to the surface. In the preliminary investigations, as well as other recent investigations on the same product, the Commission determined that seamless and welded OCTG were one like product.[4] The Commission further determined that green tubes and finished OCTG were the same like product, and that drill pipe was a separate like product from casing and tubing.[5] [6] No evidence was presented in these investigations that would change our prior determinations as to the like product. We therefore conclude that seamless and welded OCTG

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characteristics and uses with, the article subject to an investigation. . . ." 19 U.S.C. § 1677(10). The "article subject to an investigation" is defined by the scope of the investigation as set forth by the Department of Commerce.

[4] Oil Country Tubular Goods from Israel, Invs. Nos. 701-TA-271 and 731-TA-318 (Preliminary), USITC Pub. 1840 (Apr. 1986); *see also*, Oil Country Tubular Goods from Brazil, Korea, and Spain, Invs. Nos. 701-TA-215-217 (Final), USITC Pub. 1633 (Jan. 1985); Oil Country Tubular Goods from Austria, Romania, and Venezuela, Invs. Nos. 701-TA-240-241 and 731-TA-249-251 (Preliminary), USITC Pub. 1679 (Apr. 1985); Oil Country Tubular Goods from Argentina and Spain, Invs. Nos. 731-TA-191, 195 (Final), USITC Pub. 1694 (May 1985).

[5] Data in these investigations are for all oil country tubular goods, including drill pipe, which accounted for less than one-half of one percent of U.S. producers' domestic shipments in 1985. Were drill pipe excluded from these investigations, the trends in the economic indicators the Commission considers would be the same. Report to the Commission (Report) at A-17. Thus, the available data do not permit the identification of drill pipe production as a separate industry. Therefore, under section 771(4)(D) of the Tariff Act of 1930, the effect of the unfairly traded imports are to be assessed by examining the narrowest group that includes drill pipe and for which the necessary information can be provided, that is all OCTG. 19 U.S.C. § 1677(4)(D).

[6] In the current investigations, as in previous investigations, Commissioner Eckes and Commissioner Lodwick do not find that drill pipe is a separate like product. Therefore they find one domestic OCTG industry.

are one like product. We therefore have examined the impact of the subject imports on the domestic OCTG industry producing seamless and welded casing, and tubing, including green tubes, and drill pipe.[7]

Condition of the domestic industry

The Commission makes its findings on the condition of the domestic industry by considering, among other factors, U.S. consumption along with the production, capacity, capacity utilization, shipments, employment, and financial data of the domestic industry.[8]

In previous investigations, the Commission found that 1981 was an extremely prosperous year for the domestic OCTG industry. However, during the next two years, the industry's condition declined dramatically.[9] As sales and profits fell, plants and whole firms shut down. The industry showed some improvement in 1984, but its general decline continued in 1985. The domestic industry is still operating at low levels and is suffering considerable financial losses.

In 1982, after a record sales year, a number of domestic OCTG producers developed programs to expand their capacity to produce OCTG. However, as sales dropped in 1982 and 1983, some firms abandoned or delayed their planned expansions. This trend has continued, with domestic producers' capital expenditures falling from $4.8 million in 1984 to $1.9 million in 1985.[10]

Apparent U.S. consumption decreased by 66 percent from 1982 to 1983, increased in 1984, and then declined

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[7] Sections 771(4)(A) and (4)(D) of the Tariff Act of 1930 (19 U.S.C. § 1677(4)(A) and (4)(D)).

[8] 19 U.S.C. § 1677(7)(C)(iii).

[9] Oil Country Tubular Goods from Argentina, Canada, and Taiwan, Invs. Nos. 701-TA-225-226 and 731-TA-275-277 (Preliminary), USITC Pub. 1747 at 5-6 (September 1985).

[10] Report at A-28.

by 23 percent in 1985. The 1985 consumption level was 31 percent below that for 1982.[11]

Domestic production also decreased sharply from 1982 to 1983.[12] It rose in 1984, but then declined in 1985, ending up 22.2 percent below the 1982 level. Capacity declined between 1983 and 1984 and then improved slightly in 1985, but to a level below that of 1983.[13] As production fell, capacity utilization also declined to 9.6 percent in 1983. Capacity utilization rose to 31.6 percent in 1984, as some firms shut down oil country tubular goods facilities, but then fell to 27.3 percent in 1985. Shipments increased from 1983 to 1984 but then declined in 1985.[14]

The number of workers fluctuated during the period of investigation, but in 1985 was 41.9 percent below the 1982 level.[15]

Domestic OCTG producers' net sales fell from $2.0 billion in 1982 to $365 million in 1983. Net sales rose in 1984, and declined slightly in 1985, with their value reaching approximately half of the 1982 level.[16]

The domestic OCTG industry was profitable in 1982. However, in 1983, operating losses replaced profits and this trend continued in 1984 and 1985. Operating income in 1982 was $342.1 million. The domestic OCTG industry incurred operating losses of $217.1 million in 1983, $144.4 million in 1984 and $110.7 million in 1985. The number of firms reporting operating losses rose from four out of

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[11] *Id.* at A-12.

[12] *Id.* at A-21.

[13] *Id.* at A-20-A-21.

[14] *Id.* at A-21.

[15] *Id.* at A-22. Total hourly compensation fell from $19.41 in 1983 to $17.77 in 1984, then increased to $19.98 in 1985.

[16] Report at A-25, table 8.

twelve firms in 1982 to seven out of twelve firms in 1984-85.[17]

We therefore determine that the domestic OCTG industry is experiencing material injury.[18] [19]

Cumulation

The Trade and Tariff Act of 1984 mandates that the Commission cumulatively assess the volume and effect of imports if they satisfy three requirements. The imports must (1) be subject to investigation, (2) compete with both other imports and the domestic like product, and (3) be marketed within a reasonably coincidental period.[20]

For the purposes of our determination in this countervailing duty investigation, we have cumulatively assessed

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[17] *Id.*

[18] Chairwoman Stern does not regard it as analytically useful or appropriate to consider the question of material injury completely separate from the question of causation. *See* Additional Views of Chairwoman Stern in Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 at 18-19 (Dec. 1985).

[19] Commissioner Eckes believes that the Commission is to make a finding regarding the question of material injury in each investigation. *See*, Cellular Mobile Telephones and Subassemblies Thereof from Japan, *supra* at 20-21.

[20] 19 U.S.C. § 1677(7)(c)(iv). Among the factors which the Commission has considered to reach a determination on cumulation are:

> —the degree of fungibility between imports from different countries and the domestic like product, including consideration of specific customer requirements and other quality related questions;
> —the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;
> —the existence of common or similar channels of distribution for imports from different countries and domestic like product;
> —whether the imports are simultaneously present in the market.

This list is not exhaustive and no single factor is determinative.

the volume and effect of imports from Canada and Israel. For the purposes of our determinations in these antidumping investigations, we have cumulatively assessed the volume and effect of imports from Canada, Taiwan, and Israel.[21]

Imports from Canada and Israel are subject to current countervailing duty investigations. Imports from Canada, Taiwan, and Israel are subject to current antidumping investigations.

We determine that OCTG are essentially fungible.[22] Also, we determine that imports from all of the countries and the domestic like product compete with one another. Virtually all imports from Taiwan and Israel enter the U.S. through the port of Houston and are sold in the Gulf Coast and Southwest area. Although Canadian OCTG enters mostly through northern ports such as Detroit and Buffalo, two Canadian firms maintain sales offices in Houston and inventory in the Houston area, and a significant amount of Canadiam seamless product has been sold in the Southwest.[23]

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[21] Chairwoman Stern and Commissioner Rohr find it unnecessary to "cross cumulate" subsidized imports from Canada and Israel with imports from Taiwan sold at less than fair value to reach their affirmative determinations in these investigations.

Commissioner Eckes and Commissioner Lodwick did cross cumulate, but note that they would have made the same determinations had they not cross cumulated.

Commissioner Brunsdale does not cross cumulate in this case.

[22] We have made the same determination in previous cases. *See* Oil Country Tubular Goods from Israel, Invs. Nos. 701-TA-271 and 731-TA-318 (Preliminary), USITC Pub. 1840 at 8 (Apr. 1986); Oil Country Tubular Goods from Argentina, Canada, and Taiwan, Invs. Nos. 701-TA-255-256 and 731-TA-275-277 (Preliminary), USITC Pub. 1747 at 9 (September 1985).

[23] Report at A-19.

OCTG from Argentina are subject to a final countervailing duty order dating back to November 1984. Because this order is remote in time, we decline to cumulate imports from Argentina in this countervailing duty investigation.

The Taiwan respondent argued against cumulation with Israel, because Taiwan imports stopped in early 1985 and Israeli imports began in late 1985. Even if the Taiwan respondents are correct in their calculation of dates of entry, the time between the entry of the Taiwan and the Israeli imports is very short, a matter of one or two months, and thus not a proper basis for declining to cumulate.

Material injury by reason of subsidized imports from Canada

In making a determination of material injury by reason of unfair imports, section 771(7)(B) of the Tariff Act of 1930 directs the Commission to consider, among other factors, the volume of imports of the merchandise under investigation, the effect of such imports on domestic prices, and the impact of such imports on the relevant domestic industry.[24]

The combined volume of imports of OCTG from Canada and Israel accounted for a substantial and growing market share of OCTG imports. Over the period of investigation, aggregate imports from the two countries steadily increased. In addition, the aggregate share of U.S consumption supplied by imports from the two countries also increased over the period of investigation.[25] [26]

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[24] 19 U.S.C. § 1677(7)(B).

[25] Report at A-34 and A-36.

[26] The figures relating to volume of imports and market share for both Canada and Taiwan are confidential, therefore our discussion here must be in general terms.

The market share for imported OCTG supplied from all sources increased from 1983 to 1984 and then declined from 1984 to 1985. In contrast, during the 1983-1985 period, the aggregate market share for the imports cumulated in this countervailing duty investigation rose from 1983 to 1984, and increased by a higher percentage from 1984 to 1985.

We note that several countries from which OCTG is imported have reduced their import levels because of voluntary restraint agreements (VRA's). Because of this, we would expect the domestic industry's condition to have improved more than it has. Its continuing difficulties may in part be due to the entry of imports from countries such as the ones in these investigations which have not signed VRA's and whose increased market share may be replacing that of restrained countries and inhibiting U.S. producers' sales.[27]

We further note that the domestic industry's market share fell from 54.8 percent in 1983 to 40.3 percent in 1984, and increased in 1985, but not up to the 1983 levels.[28]

During the period under investigation, the Commission obtained pricing data for 10 domestic OCTG categories. Prices fell from 1983 to 1985 for nine of the categories.[29] This depression of domestic prices and profitability has resulted in part from the presence of the unfairly traded imports in the market.

Comparisons of relative prices for domestic and imported OCTG from the countries cumulated in the coun-

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[27] Report at A-51-A-52.

[28] *Id.* at A-36. Although the domestic market share rose in 1985 to 48.7 percent, the volume of domestic shipments did decline.

[29] *Id.* at A-38.

tervailing duty investigation showed close pricing with mixed underselling and overselling.[30]

We recognize that there have been several causes of injury to the domestic OCTG industry during the period of investigation, including decreased demand for the product. However, the Commission is not to weigh causes in an antidumping or countervailing duty investigation at either the preliminary or final stage. It is possible for both declining demand and unfairly traded imports to materially injure an industry. In fact, the imports might result in relatively greater injury to an industry facing a downturn in demand. In this instance, the domestic OCTG industry not only experienced decreased sales and profits, but also lost market share as the unfair imports gained market share during the period of investigation.

Based upon the foregoing considerations, we determine that the domestic industry is materially injured by reason of subsidized OCTG imports from Canada.

Material injury by reason of LTFV imports from Canada and Taiwan

The combined volume of imports of OCTG from Canada, Taiwan, and Israel accounted for a substantial and growing market share of OCTG imports. Over the period of investigation aggregate imports from the three countries steadily increased.[31] In addition, the aggregate share of U.S. consumption supplied by imports from the three countries also increased over the period of investigation.

The market share for imported OCTG supplied from all sources increased from 1983 to 1984 and then declined from 1984 to 1985. In contrast, during the 1983-1985 period, the aggregate market share for the imports cumu-

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[30] *Id.* at A-39-A-40. Oil Country Tubular Goods from Israel, *supra* at 11.

[31] Report at A-33.

lated in these antidumping investigations rose from 1983 to 1984, and increased by a higher percentage from 1984 to 1985.

Comparisons of relative prices for domestic and imported OCTG from the countries cumulated in the LTFV investigations showed close pricing with mixed underselling and overselling.[32]

Again we note the existence of VRA's, which limit some imports but not the imports subject to these investigations. We further note that the difficulties of the domestic industry may be due in part to causes other than imports, but that the existence of such causes does not preclude and may exacerbate the harmful effect of unfair imports.

Based upon the foregoing considerations, we determine that the domestic industry is materially injured by reason of LTFV oil country tubular goods from Canada and Taiwan.

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[32] *Id.* at A-39-A-40. Oil Country Tubular Goods from Israel, *supra* at 11.

VIEWS OF VICE CHAIRMAN LIEBELER

Inv. No. 701-TA-255 (Final) &
Inv. Nos. 731-TA-276 and 277 (Final)
Oil Country Tubular Goods from Canada and Taiwan

I determine that an industry in the United States is not materially injured, or threatened with material injury, by reason of subsidized imports of oil country tubular goods (OCTG) from Canada.[1] I make the same determination with regard to imports of OCTG from Canada and Taiwan sold at less than fair value (LTFV).

Cumulation

Petitioners urge the Commission to cumulate imports of OCTG from Argentina, Canada, Taiwan and Israel. Imports from all these countries (with the exception of Argentina) are subject to current antidumping investigations.[2] Imports from Canada and Israel are also subject to current countervailing duty investigations and Argentina is subject to a final countervailing duty order issued in 1984.

A. Canada

Respondents argue against cumulation of imports from Canada with other imports on the ground that OCTG from Canada and other countries are used in distinct geographical markets in the U.S. In a recent OCTG investigation, I did not cumulate imports from Canada with imports from Israel because I concluded that Canadian imports did not compete in the Gulf Coast market.[3] Since that time ad-

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[1] Material retardation is not an issue because the industry is well established. I join with my fellow commissioners in their discussion of like product/domestic industry and condition of the domestic industry.

[2] The Department of Commerce has recently made a final negative determination with regard to Argentina.

[3] *See* Oil Country Tubular Goods from Israel, Inv. No. 701-TA-271 (Preliminary), USITC Pub. No. 1840 (1986), at 13-14 (Views of Vice Chairman Liebeler).

ditional evidence gathered by the staff for this investigation suggests that Canadian imports compete in the Gulf Coast area with those from Israel and Taiwan. Two Canadian firms now maintain sales offices in Houston. Moreover, a significant amount of Canadian OCTG inventory exists in the Houston area.[4] Thus, the Canadian presence is not *de minimus*.

In the countervailing duty investigation, it is appropriate to cumulate Canadian imports only with those from Israel. Commerce has made a final negative determination in the recent Taiwan countervailing duty case. Imports from Argentina are subject to a final order. I do not cumulate cases subject to final orders with cases under investigation. Imports from countries subject to outstanding countervailing duty or antidumping duty orders cannot be cumulated with imports from countries that are currently the subject of an investigation. The language of the 1984 Act refers to "imports from two or more countries of like products *subject to investigation* * * *."[5] Thus, the plain meaning of the statute limits a broader application. In addition, it would be contrary to the injury requirement in Title VII to cumulate products from countries subject to a final countervailing duty or antidumping order with imports from countries that are currently under investigation. The purpose of the investigation undertaken by the Commission is to determine whether the imports from the countries under investigation are causing or threatening to cause material injury to the domestic industry. Whatever injury was caused or was threatened by imports of the like product already subject to an order have been remedied by that order. Thus, it makes no sense to cumulate imports subject to a final order with those from countries under investigation.

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[4] Algoma, a major Canadian exporter to the United States, reported that its sales in Texas, Oklahoma, and Louisiana, were significant.

[5] 19 U.S.C. 1677(7)(C)(iv)(supp. 1985)(emphasis added).

Nor do I cumulate across countervailing duty and dumping statutes. Consequently, in the Canadian countervailing duty case, it is irrelevant that imports from other countries are subject to current antidumping investigations. I believe that the statute is clear on this matter. First, Commission treatment of foreign government subsidization of imports and sales by private firms at LTFV are governed by different sections of Title VII. This raises a presumption that Congress intended to treat the two activities separately. Second, not cross-cumulating is historical Commission practice, existing prior to the statutory enactment of the existing statutory cumulation provisions. Obviously, Congress could have chosen to alter this practice but did not do so. Third, the wording of the operative sections of Title VII precludes cross-cumulation. For example, the language of the countervailing duty section clearly requires that the injury be by reason of subsidized imports, not subsidized and dumped imports.[6] If the Commission were to cross-cumulate, it would be acting outside its statutory authority. One simple cannot make an affirmative determination in, *e.g*, a countervailing duty case based on dumped imports.[7]

Thus, in the Canadian countervailing duty investigation, the market penetration for 1985 is the sum of the Ca-

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[6] The Commission is to examine whether an industry in the United States is materially injured or threatened with material injury "by reason of *imports of that merchandise* * * *." 19 U.S.C. 1671(a)(2) (1980 & 1985 Supp.) (emphasis added).

[7] In *Bingham and Taylor, Div. Virginia Industries*, Slip Op. 86-14 (Feb. 14, 1986), the Court of International Trade stated that cumulation across statutes is required. The Commission has voted to appeal *Bingham* to the Court of Appeals for the Federal Circuit. Until this issue is resolved I shall not cumulate across statutes because I believe the statutes preclude cross-cumulating. For a complete discussion of my views on cross-cumulation, see Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela, Invs. Nos. 701-TA-225-234 (Preliminary) & 731-TA-213-217, 219, 221-226, & 228-235 (Preliminary), USITC Pub. 2642, at 41-50 (1985) (Views of Vice Chairman Liebeler).

nadian and Israeli market shares, which is less than six and one-half percent.[8]

In the Canadian antidumping investigation, it is appropriate to cumulate Canadian imports with those from Taiwan and Israel. In this investigation, the market penetration is less than six and one-half percent for 1985.[9]

B. Taiwan

It is appropriate to cumulate imports from Taiwan with those from Israel and Canada since they all compete with each other and the domestic product, and they all are subject to current antidumping investigations. Consequently, the import penetration ratio is less than six and one-half percent for 1985.[10]

No Injury or Threat Thereof by Reason of Imports from Canada and Taiwan.

In order for a domestic industry to prevail in a final investigation, the Commission must determine that the dumped or subsidized imports cause or threaten to cause material injury to the domestic industry producing the like product. First, the Commission must determine whether the domestic industry producing the like product is materially injured or is threatened with material injury. Second, the Commission must determine whether any injury or threat thereof is by reason of the dumped or subsidized imports. Only if the Commission answers both questions in the affirmative, will it make an affirmative determination in the investigation.

Before proceeding to an analysis of the data, however, the first question is whether the statute is clear or whether one must resort to the legislative history in order to in-

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[8] These figures are approximated for confidentiality purposes.

[9] These figures are approximated for confidentiality purposes.

[10] These figures are approximated for confidentiality purposes.

terpret the relevant sections of title VII. The accepted rule of statutory construction is that a statute, clear and unambiguous on its face, need not and cannot be interpreted using secondary sources. Only statutes that are of doubtful meaning are subject to such statutory interpretation.[11]

The statutory language used for both parts of the two-part analysis is ambiguous. "Material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant."[12] This definition restates the positive in double negative form. As for the causation test, "by reason of" lends itself to no easy interpretation, and has been the subject of much debate by past and present commissioners. Clearly, well-informed persons may differ as to the interpretation of the causation and material injury sections of title VII. Therefore, the legislative history becomes helpful in interpreting title VII.

The ambiguity arises in part because it is clear that the presence in the United States of additional foreign supply will always make the domestic industry worse off. Any time a foreign producer exports products to the United States, the increase in supply, *ceteris paribus*, must result in a lower price of the product than would otherwise prevail. If a downward effect on price, accompanied by a Department of Commerce dumping or subsidy finding and a Commission finding that financial indicators were down were all that were required for an affirmative determination, there would be no need to inquire further into causation.

But the legislative history shows that the mere presence of LTFV imports is not sufficient to establish causation. In the legislative history to the Trade Agreements Acts of 1979, Congress stated:

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[11] Sands, Sutherland Statutory Construction Sec. 45.02 (4th Ed.)

[12] 19 U.S.C. sec. 1977(7)(A)(1980).

> [T]he ITC will consider information which indicates that harm is caused by factors other than the less-than-fair-value imports.[13]

The Finance Committee emphasized the need for an exhaustive causation analysis, stating, "the Commission must satisfy itself that, in light of all the information presented, there is a sufficient causal link between the less-than-fair-value imports and the requisite injury."[14]

The Senate Finance Committee acknowledged that the causation analysis would not be easy: "The determination of the ITC with respect to causation, is under current law, and will be, under section 735, complex and difficult, and is matter for the judgment of the ITC."[15] Since the domestic industry is no doubt worse off by the presence of any imports (whether LTFV or fairly traded) and Congress has directed that this is not enough upon which to base an affirmative determination, the Commission must delve further to find what condition Congress has attempted to remedy.

In the legislative history to the 1974 Act, the Senate Finance Committee stated:

> This Act is not a 'protectionist' statute designed to bar or restrict U.S. imports; rather, it is a statute designed to free U.S. imports from unfair price discrimination practices. * * * The Antidumping Act is designed to discourage and prevent foreign suppliers from using unfair price discrimination practices to the detriment of a United States industry.[16]

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[13] Report on the Trade Agreements Act of 1979, S. Rep. No. 249, 96th Cong. 1st Sess. 75 (1979).

[14] *Id.*

[15] *Id.*

[16] Trade Reform Act of 1974, S. Rep. 1298, 93rd Cong. 2d Sess. 179.

Thus, the focus of the analysis must be on what constitutes unfair price discrimination and what harm results therefrom:

> [T]he Antidumping Act does not proscribe transactions which involve selling an imported product at a price which is not lower than that needed to make the product competitive in the U.S. market, even though the price of the imported product is lower than its home market price.[17]

This "difficult and complex" judgment by the Commission is aided greatly by the use of economic and financial analysis. One of the most important assumptions of traditional microeconomic theory is that firms attempt to maximize profits.[18] Congress was obviously familiar with the economist's tools: "[I]mporters as prudent businessmen dealing fairly would be interested in maximizing profits by selling at prices as high as the U.S. market would bear."[19]

An assertion of unfair price discrimination should be accompanied by a factual record that can support such a conclusion. In accord with economic theory and the legislative history, foreign firms should be presumed to behave rationally. Therefore, if the factual setting in which the unfair imports occur does not support any gain to be had by unfair price discrimination, it is reasonable to conclude that any injury or threat of injury to the domestic industry is not "by reason of" such imports.

In many cases unfair price discrimination by a competitor would be irrational. In general, it is not rational to charge a price below that which is necessary to sell one's product. In certain circumstances, a firm may try to cap-

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[17] *Id.*

[18] *See, e.g.*, P. Samuelson & W. Nordhaus, *Economics* 42-45 (12th ed. 1985); W. Nicholson, *Intermediate Microeconomics and Its Application* 7 (3d ed. 1983).

[19] Trade Reform Act of 1974, S. Rep. 1298, 93rd Cong. 2d Sess. 179.

ture a sufficient market share to be able to raise its price in the future. To move from a position where the firm has no market power to a position where the firm has such power, the firm may lower its price below that which is necessary to meet competition. It is this condition which Congress must have meant when it charged us "to discourage and prevent foreign suppliers from using unfair price discrimination practices to the detriment of a United States industry."[20]

In *Certain Red Raspberries from Canada*, I set forth a framework for examining what factual setting would merit an affirmative finding under the law interpreted in light of the cited legislative history.[21]

> The stronger the evidence of the following . . . the more likely that an affirmative determination will be made: (1) large and increasing market share, (2) high dumping margins, (3) homogeneous products, (4) declining prices and (5) barriers to entry to other foreign producers (low elasticity of supply of other imports).[22]

The statute requires the Commission to examine the volume of imports, the effect of imports on prices, and the general impact of imports on domestic producers.[23] The legislative history provides some guidance for applying these criteria. The factors incorporate both the statutory criteria and the guidance provided by the legislative history. Each of these factors is evaluated in turn.

Examining import penetration data is relevant because unfair price discrimination has as its goal, and cannot take

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[20] Trade Reform Act of 1974, S. Rep. 1298, 93rd Cong. 2d Sess. 179.

[21] Inv. No. 731-TA-196 (Final), USITC Pub. 1680, at 11-19 (1985) (Additional Views of Vice Chairman Liebeler).

[22] *Id.* at 16.

[23] 19 U.S.C. 1677(7)(B)-(C) (1980 & cum. supp. 1985).

place in the absence of, market power. In these investigations, market penetration of imports was less than six and one-half percent for 1985, up slightly from the prior two years.[24] These market shares are in a low range and are not growing rapidly. Thus, this first indicator is not at all suggestive of unfair price discrimination conditions.

The second factor is a high margin of dumping or subsidy. The higher the margin, *ceteris paribus*, the more likely it is that the product is being sold below the competitive price [25] and the more likely it is that the domestic producers will be adversely affected. In this case, the weighted-average dumping margin was 26.32 percent for Taiwan. As to Canada, the Department of Commerce found that the estimated net subsidy was 0.72 percent ad valorem, and the dumping margin was 19.38 percent. I find that the Canadian subsidy margin is so low as to strongly weigh against an affirmative determination. The dumping margins do not weigh against such a finding.

The third factor is the homogeneity of the products. The more homogeneous the products, the greater will be the effect of any allegedly unfair practice on domestic producers. In general, domestically produced and foreign OCTG are physically almost identical.

As to the fourth factor, prices fluctuated but generally decreased for most products.[26] Over the period January-March 1983 to October-December 1985, no consistent patterns or cycles were discernable in the fluctuation of prices for ten categories of OCTG.[27] However, one pattern did arise with respect to magnitude of changes. The greatest

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[24] These figures are approximated for confidentiality purposes.

[25] *See* text accompany note 17, *supra*.

[26] Staff Report at A-38.

[27] *Id.*

percentage decrease in prices occurred for the OCTG used in deep wells.[28] This information is consistent with the character of recent oil industry conditions, i.e., the first wells to be closed with the drop in oil prices would be the costlier deep wells. No strong conclusions can be drawn from the pricing information in this case.

The fifth factor is barriers to entry (foreign supply elasticity). If there are barriers to entry (or low foreign elasticity of supply) it is more likely that a producer can gain market power. In this case, voluntary restraint agreements (VRA's) affect the subject imports from 17 countries, including all major foreign suppliers except Canada. Although the VRA's constrain foreign supply, the economic diversity of the countries producing OCTG suggests there are low entry barriers (e.g., technological barriers) and other countries not currently subject to VRA's could enter the market. Altogether, the evidence under this factor is somewhat conducive to price discrimination behavior.

These factors must be balanced in each case to reach a sound determination. As noted earlier, however, market share plays a key role in determining whether unfair price discrimination could be occurring. In this case, the market penetration figures indicate that what we are observing is not related to unfair price discrimination. The other factors in this case may suggest some conditions conducive to unfair price discrimination, but do not outweigh the low market share. Thus, the factors when viewed together are inconsistent with a finding of unfair price discrimination.

This conclusion is buttressed by an examination of the market share of imports of OCTG and the consumption patterns for OCTG in the United States. As I have stated previously, the declines that the domestic OCTG industry has experienced are the result of a sharp drop in demand for OCTG, and not the result of dumped or subsidized

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[28] *Id.*

imports.[29] The consumption of OCTG is strongly correlated with the level of domestic drilling for oil and natural gas. The level of domestic oil and gas drilling is in turn determined by the world prices for oil and natural gas, state and federal regulations, and the available reserves of oil and natural gas.

I conclude that there is nothing on the record from which to conclude that cumulated imports of OCTG from the countries under investigation are a cause of material injury or threaten to cause material injury to the domestic OCTG industry. This is because although cumulated imports from the countries under investigation have increased over the period of investigation, both in volume and as a share of domestic consumption, they have increased at the expense of other imports, and not at the expense of the domestically produced OCTG. For example, imports from Canada, Taiwan, and Israel increased annually from 1983 through 1985 respectively.[30] Total imports from all countries for those years were 661,000, 2,307,000 and 1,539,000 tons respectively. In market share terms, imports from Canada, Taiwan and Israel increased slightly between 1983-85.[31] The share of all imports was 45.1 percent, 59.7 percent, and 51.3 percent. U.S. consumption ranged from 1,462,000 tons in 1983 to 3,870,000 tons in 1984 and 2,999,000 tons in 1985. Two things are apparent from these numbers. First, imports generally

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[29] *See, e.g.*, Oil Country Tubular Goods from Brazil, Korea and Spain, Inv. Nos. 701-TA-215-217 (Final), USITC Pub. 1633 (1985); OCTG from Austria, Romania and Venezuela, Inv. Nos. 701-TA-240-214, 731-TA-249-251 (Preliminary), USITC Pub. 1679 (1985); OCTG from Argentina and Spain, Inv. Nos. 731-TA-191, 195 (Final), USITC Pub. 1694 (1985); & OCTG from Argentina, Canada and Taiwan, 701-TA-255 and 256 (Preliminary) and 731-TA-275-277 (Preliminary) (1985).

[30] Staff Report at A-33, Table 17. The exact figures cannot be revealed because the information is confidential.

[31] The exact figures cannot be revealed because the information is confidential.

and fall in domestic consumption. Second, the imports from the countries under investigation took away market share from other imports, not from U.S. producers' market share. In fact, U.S. producers' market share increased significantly between 1984 and 1985. Quite simply, a declining market for OCTG, not the imports under investigation, are the cause of U.S. producers' problems.

As to threat of material injury, importers' 1985 inventories for Canadian imports as a percentage of yearly shipments were down sharply from 1983. Inventories of Taiwanese product are insignificant. I have not relied on capacity utilization figures here because they have little relevance when the base of market penetration is so low in the first place. Thus, there is no real and imminent threat of material injury to the U.S. industry.

Conclusion

Therefore, I conclude that an industry in the United States is not materially injured or threatened with material injury by reason of subsidized or dumped imports from the countries under investigation.

DISSENTING VIEWS OF COMMISSIONER BRUNSDALE

Based on the record in this case, I determine that no domestic industry in the United States is materially injured, or threatened with material injury, by reason of subsidized imports of oil country tubular goods from Canada or from less-than-fair-value (dumped) imports of oil country tubular goods from Canada and Taiwan that have been the subject of affirmative subsidy and antidumping determinations by the Department of Commerce. Material retardation of the establishment of an industry in the United States is not an issue in this case and will not be discussed.

While I dissent from the affirmative decisions reached by my esteemed colleagues in the majority on this case, I do nonetheless concur with several of their findings. Specifically, I agree with the following: (1) like product—the like product is seamless and welded oil country tubular goods (OCTG); (2) domestic industry—the domestic industry consists of the producers of OCTG;[1] (3) cumulation—

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[1] However, I have reservations about whether the data relied on by the majority are appropriate to analyze the condition of the industry. My concern stems from the fact that the producers of OCTG also make other products using the *same facilities and equipment*. These products include not only drill pipe, but also, e.g., standard and line pipes and tubes. Transcript at 42-31 (Tr.), Report at A-20, and Posthearing Briefs by Lone Star Steel and CF&I (at appendices 2 and 3), by Maverick Tube, Cyclops, Copperweld (in Response to written questions from Commissioner Brunsdale at 1 and 2), and by U.S. Steel (in Response to Questions from the Commission at 6). This means that there is a *commonality* of inputs in the production of several products, including the like product. As I have argued previously, it is necessary in such conditions to apply a product line analysis, pursuant to 19 U.S.C. sec. 1677(4)(D), when analyzing the effect of imports. *See* Certain Welded Carbon Steel Pipes and Tubes from India, Taiwan, and Turkey, Invs. Nos. 731-TA-271 through 273 (Final), USITC Pub. No. 1986 at 34 (Views of Vice Chairman Liebeler and Commissioner Brunsdale), and Certain Welded Carbon Steel Pipes and Tubes from Turkey and Thailand, Invs. Nos. 701-TA-253 (Final) and 731-TA-252 (Final), USITC Pub.

in analyzing the effects of subsidized imports from Canada, I cumulate the imports of Canada and Israel, and in analyzing the effects of dumped imports from Canada and Taiwan, I cumulate the imports of these two countries and also Israel;[2] and (4) material injury—the domestic industry is materially injured.

In determining whether there is material injury to the domestic industry "by reason of" the imports subject to the investigation, the Commission must consider, among other factors, the volume of imports, the effect of the subsidized or dumped imports on prices for the like product in the United States, and the impact of such imports on the relevant domestic industry.[3] My decision that there is no material injury by reason of the subject imports rests mainly on the finding that cumulated import penetrations remained very low over the entire period of investigation, 1983-85.[4] Moreover, the condition of the industry improved somewhat even though the subject imports increased. This indicates that the requisite causal link between the injury and imports is not present.

The cumulative import penetration for Canada and Israel was 5.9 percent in 1985 while that for Canada, Israel, and Taiwan was slightly in excess of 5.9 percent.[5] Such small import penetrations have at most a *de minimis* effect

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No. 1986 at 49 (Additional Views of Commissioner Brunsdale). In spite of my concern about this issue, I note that it does not affect my determination in this case.

[2] For my general views on cumulation, *see* Certain Welded Carbon Steel Pipes and Tubes from India, Taiwan, and Turkey, *supra*, at 46-9. I do not cross cumulate in this case.

[3] 19 U.S.C. sec. 1677(7)(C) (1982).

[4] The discussion here relies on publicly available import penetration data because the penetration ratios for subsidized and dumped imports in this case are confidential. The confidential ratios are somewhat smaller.

[5] Staff Report at A—13.

on the condition of an industry with the characteristics of this one. Generally speaking, a small penetration ratio for an imported product means that the imports will have little effect on the price of the domestic product. A small ratio cannot have a disproportionately large effect on price unless two conditions are present—that is, unless *both* the domestic demand for the product and the domestic supply of the product are highly insensitive to price changes.[6] In this case, demand may be fairly insensitive to changes in price because the products in question are intermediate products on the demand side. There is no evidence, however, to indicate that domestic supply is inelastic.

During the period of investigation, the world-wide downturn in oil prices caused a severe decline in demand for OCTGs and contributed to a large stock of OCTG inventories in relation to domestic consumption.[7] For example, in 1985 OCTG inventories were at least equal to a full year's consumption.[8] By contrast, cumulated imports in 1985 were less than 6 percent of annual consumption.[9] I find it difficult to believe that imports could have a significant depressing effect on domestic prices under these conditions.

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[6] The sensitivity of demand or of supply to price is measured by the concept of elasticity. For example, elasticity of demand measures the responsiveness of quantity demanded to price changes. It is expressed as the percentage change in quantity demanded divided by the percentage change in price. Inelastic demand means that the quantity demanded changes by a smaller percentage than does price. The elasticity of supply measures the responsiveness of supply to price changes in the same manner. P. Samuelson and W. Nordhaus, *Economics* 380-84 (12th ed., 1985).

[7] These points were made by Dr. Leone in his testimony at the hearing. Tr at 138. *See* also the Posthearing Brief by Algoma Steel, Ferrum, and Christianson Pipe, at 5. While I do not necessarily agree with all of Dr. Leone's conclusions, I found his presentation to be very useful in this case.

[8] Staff Report at A—13 and A—20.

[9] *Id.* at 13.

Moreover, during the period when the cumulated imports increased, the condition of the industry showed signs of improvement. Between 1983 and 1985, production, shipments, capacity utilization, and net sales were all up.[10] In addition, the financial condition of the industry improved markedly.[11] For example, while gross profits and operating profits were negative throughout the period, the losses steadily diminished. The ratio of gross profits and operating profits to sales were a negative 44.8 percent and 59.4 percent respectively in 1983; both measures improved to negative 7.0 percent and 11.4 percent in 1985.[12] The fact that the industry's condition strengthened as imports rose does not prove that imports did not cause material injury, but it does mean that very strong evidence would be required to establish a causal link. No such evidence is present. Instead, the record shows a severe deterioration in demand and an extraordinarily large inventory overhang. In my view these factors explain substantially all of the material injury suffered by the domestic industry. The influence of the imports covered by this investigation was insignificant at best, since we have small import penetration ratios and a negative correlation with the improving condition of the domestic industry.[13]

As to threat of material injury, the low base of penetration achieved by the cumulated countries makes it im-

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[10] *Id.* at A-20, A-21, and A-25.

[11] *Id.* at A-38.

[12] *Id.* at A-25.

[13] Note also that the subsidy margin in this case is extremely low—0.72 percent. Report at A-4. This means that the effect of subsidized imports on the domestic industry is insignificant. The dumping margins in this case are moderate—19 percent for Canada and 26 percent for Taiwan. Report at A-4. However, given the other evidence discussed above (e.g., the low import penetration, the serious drop in industry demand, and the substantial inventory overhang in the domestic market) I find that these margins did not have a significant effect on the domestic industry.

probable that there could be any real threat of material injury or imminent actual injury. Moreover, for Canada, which had the largest import share in 1985 (5.0 percent), it should be noted that capacity utilization was moderately high that year, and information about inventories does not suggest a recent buildup of stocks.[14] In view of these facts, I find no support for the argument that there is a threat of material injury.

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[14] Report at A-30-1 and A-96.

Supreme Court, U.S.
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No. 88-1781

In The

Supreme Court of the United States

October Term, 1988

THE ALGOMA STEEL CORPORATION, LIMITED,

Petitioner,

v.

THE UNITED STATES and U.S. INTERNATIONAL TRADE COMMISSION,

Respondents,

and

LONE STAR STEEL COMPANY,

Respondent,

IPSCO, INC. AND IPSCO STEEL, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 6, 1989

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QUESTION PRESENTED

In conducting its material injury investigation under Title VII of the Tariff Act of 1930, did the U.S. International Trade Commission err as a matter of law in investigating the effects on a domestic industry of all of the imports found by the Department of Commerce to be sold, or likely to be sold, at less than fair value?[1]

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[1] In accordance with Rule 28.1 of the Rules of this Court, Lone Star Steel Company is a subsidiary of Lone Star Technologies, Inc.

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STATEMENT OF FACTS

The facts of this case are not in dispute. Briefly, after making the investigation prescribed by statute, the Department of Commerce determined that oil country tubular goods (OCTG) from Canada were being, or were likely to be, sold at less than fair value in the United States. The Department's determination stated:

> **Final Determination**
>
> Based upon our investigation, we have determined that *OCTG from Canada* are being, or are likely to be, sold in the United States at less than fair value . . . We made fair value comparisons on approximately 83 percent of the sales of the class or kind of merchandise to the United States during the period of investigation.
>
> . . . .
>
> Since Welded Tube had no sales at less than fair value, that company is *excluded from this final determination of sales at less than fair value.*

51 Fed. Reg. 15029 (April 22, 1986) (emphasis supplied).[2]

---

[2] Section 731 of the Tariff Act of 1930, 19 U.S.C. § 1673, provides that the Department of Commerce is to determine whether a class or kind of merchandise is being sold, or is likely to be sold, at less than fair value. If that decision is in the affirmative, the United States International Trade Commission then determines whether an industry in the United States is materially injured, or threatened with material injury, by reason of imports of that merchandise. If that answer is in the affirmative, an estimated antidumping duty is paid on all further importations of the merchandise, until each individual entry can be reviewed to determine whether it has been sold at less than fair value. Section 751 of the Tariff Act, 19 U.S.C. § 1675.

The United States International Trade Commission, following its ordinary investigative methodology, made an affirmative determination in its injury investigation.[3] In doing so, the Commission considered as the imports allegedly causing the injury the entire class of merchandise that the Commerce Department had determined was being sold at less than fair value, that is, all OCTG imported from Canada except for OCTG manufactured by Welded Tube. It rejected Algoma's argument that it should have segregated and considered noninjurious the individual transactions during the investigative period for which the Department of Commerce had determined there were no dumping margins.

The Court of International Trade upheld the Commission determination, and the Court of Appeals for the Federal Circuit affirmed.

ARGUMENT

I. TITLE VII REQUIRES THE COMMISSION TO ASSESS INJURY BY REASON OF THE CLASS OR KIND OF MERCHANDISE DESCRIBED IN THE COMMERCE DEPARTMENT'S AFFIRMATIVE DETERMINATION

The Court of Appeals for the Federal Circuit correctly determined that the Commission followed the statutory

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[3] Oil Country Tubular Goods from Canada and Taiwan, USITC Pub. 1865, Inv. Nos. 701-TA-255, 731-TA-276-77 (Final) (June 1986).

scheme by considering all imports found by the Commerce Department to be sold, or likely to be sold, at less than fair value when making its injury analysis. The statute governing the conduct of material injury investigations could scarcely be clearer in requiring the Commission to accept the Commerce Department's determination regarding the imports to be investigated. Section 731 of the Tariff Act of 1930, 19 U.S.C. § 1671 provides (emphasis supplied):

> If –
>
> (1) the administering authority determines that *a class or kind of foreign merchandise* is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that –
>
> (A) an industry in the United States –
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury,
>
> . . .
>
> *by reason of imports of that merchandise,*
>
> then there shall be imposed upon such merchandise an antidumping duty . . .

The only sensible reading of the statute is that the "class or kind of foreign merchandise" determined to be sold at less than fair value is "that merchandise" by reason of which the Commission must determine injury.

In this case, the Commerce Department made the following determination:

Final Determination

> Based upon our investigation, we have determined that *OCTG from Canada* are being, or are likely to be, sold in the United States at less than fair value . . . We made fair value comparisons on approximately 83 percent of the sales of the class or kind of merchandise to the United States during the period of investigation.
>
> . . . .
>
> Since Welded Tube had no sales at less than fair value, that company is *excluded from this final determination of sales at less than fair value.*

51 Fed. Reg. 15029 (April 22, 1986) (emphasis supplied). The class or kind of merchandise with respect to which the Commerce Department made an affirmative determination is OCTG from Canada, excepting OCTG manufactured by Welded Tube.[4] The statute requires the Commission to consider whether the domestic industry producing OCTG (the like product) is materially injured by reason of imports of OCTG from Canada, excepting the OCTG produced by Welded Tube.

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[4] The class or kind of merchandise is delineated by the type of product under investigation and by country of origin. Both the concept of a "class or kind" of merchandise, and country of origin have their origins in Customs law. However, neither Commerce nor the Commission are bound by Customs interpretations in defining categories of merchandise for purposes of the antidumping law. *Royal Business Machines, Inc. v. United States*, 1 CIT 80, 507 F.Supp. 1007, 1014 n. 18 (1980), *aff'd* 669 F. 2d 692 (C.C.P.A. 1982). Commerce has broad authority to define the scope of the class or kind of merchandise under investigation. *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983).

The procedural portion of the Tariff Act is equally plain. Section 735 of the Act, 19 U.S.C. § 1673d(b)(1), requires that the Commission determine whether there is material injury or threat of material injury "by reason of imports of the merchandise *with respect to which the administering authority has made an affirmative determination . . .*" (emphasis supplied). Commerce's affirmative determination in this case covers all OCTG from Canada except Welded Tube's. That is the merchandise on which the Commission's decision must be based.

The Commerce Department's affirmative determination that OCTG is being, or is likely to be, sold at less than fair value may have been based upon a finding that a goodly proportion, rather than all, sales during the period of investigation were at LTFV. Nonetheless, the determination covers more than just the LTFV sales during the period of investigation. The Commission is not free to pick and choose among the merchandise covered by Commerce's affirmative determination. The Commission cannot consider only certain sales of the merchandise.

As the statute is clear on the point, the inquiry can end here. However, for completeness, we will show why this statutory scheme makes sense.

II. THE CURRENT ALLOCATION OF FUNCTIONS BETWEEN COMMERCE AND THE COMMISSION ACCORDS WITH TITLE VII

The Commerce Department makes its determinations with respect to an entire class or kind of merchandise subject to an investigation, not simply with respect to

those transactions actually recorded as being below fair value. The Department, in addition, exercises its power to exclude imports by companies found not to be selling at LTFV. It must do this, because its statutory mandate is to determine whether a class or kind of merchandise is being dumped, *or is likely to be dumped*, not whether certain transactions have been below fair value. That latter inquiry forms the basis of the Department's decision whether the class or kind of merchandise is being, or is likely to be, sold at less than fair value.

The Department reaches its determination of whether an entire class or kind of merchandise is being sold at LTFV by examining a representative sample of sales over a representative time period, generally at least 60 percent of sales during the month in which a petition is filed and the five preceding months. 19 C.F.R. § 353.42(b) (54 Fed. Reg. 12786, March 28, 1989). It is neither required to, nor does it, examine all sales of the subject imports which occurred during that period in order to reach its determination. It examines such sales on a company-by-company basis.

It is important to recognize that the determination is made for the purpose of deciding whether *future* imports of the merchandise under investigation should be examined to determine if they are being sold at LTFV. Commerce's initial investigation results in no actual duty collections on the sales examined.

Thus the point of the Department's investigation is not, as Algoma suggests, to determine whether certain particular sales were at LTFV. Rather the purpose is to determine whether enough of the merchandise under

investigation is being sold at LTFV during a representative period to warrant investigating *all* future import transactions relating to this merchandise.[5]

A second purpose of the Department's investigation is to determine the deposit rate for sales that will be entering the United States during the following year. This is the primary function and purpose of calculating the weighted average dumping margin.[6] Each company investigated by Commerce will have its own specific weighted average margin. It pays estimated duties in the amount of its margins. Companies that import the product under investigation, but were not investigated, are required to post a deposit in the amount of the weighted average margin for all sales examined from that country.

In sum, the significance Algoma would have this Court attach to the LTFV sales found by Commerce in an initial investigation is totally different from the significance the statute mandates the Commerce Department to attach to those sales, and would result in gross discrepancies between the imports covered by Commerce's final determination and the imports examined by the Commission.

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[5] When imports which enter the United States are subject to an antidumping duty order, the importer is required to post a cash deposit to cover any antidumping duties that may be assessed once Commerce reviews the specific transaction, which it does annually. Once Commerce determines the actual antidumping duty amount on the particular sale, the estimated duty deposited is refunded or augmented, as the case may be. 19 U.S.C. § 1673e.

[6] A description of the Commerce Department's method for determining the weighted average dumping margin is presented in the Appendix to this petition.

III. NEITHER LEGISLATIVE HISTORY NOR THE ANTIDUMPING CODE REQUIRES A DIFFERENT RESULT

Petitioner can cite any number of statements in the legislative history to Title VII of the Tariff Act or to the GATT Antidumping Code[7] to the effect that an affirmative injury finding may not be based upon the effect of fairly traded imports. What petitioner refuses to recognize is the OCTG it exported to the United States was found to be unfairly traded, even though some individual shipments were at undumped prices. This is because the Commerce Department must determine whether a *class* of merchandise warrants further investigation, if the Commission determines there is sufficient injury to require it. In this case, had the Commission determined injury by reason of Welded Tube's imports, it would have acted contrary to the legislative history and the Code, because it would have assessed causation by reason of fairly traded imports. Both the Congress and our trading partners fully understand that the phrase "dumped imports" means the class of imports subject to an affirmative determination, not simply those investigated transactions found to have margins. This is evidenced by the fact that during the ten years that the Commission has been administering Title VII, this is the first time that this issue has even been raised.

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[7] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL H. STEIN
Counsel for Respondent
Lone Star Steel Company

June 6, 1989

APPENDIX

Calculation of the Weighted Average Dumping Margin

The weighted average dumping margin is calculated by compiling the results of all sales examined, both those made at fair value and those made at LTFV. Only if the weighted average margin is more than *de minimis* will Commerce subject a company, or country, to an anti-dumping duty order. Thus, through the calculation of the weighted average dumping margin, Commerce considers all of the evidence in front of it in determining whether the class or kind of merchandise is being, or is likely to be, sold at LTFV.

In this context, it is useful to recall how the Department actually calculates margins, to show how the Department ultimately decides whether a class or kind of merchandise is being dumped, or is likely to be dumped.

The foreign market value is compared to the U.S. price of the sales being examined that the foreign producers/exporters made to U.S. purchasers during the six-month period of investigation. In order to make comparisons, Commerce converts the foreign market value into U.S. dollars. After conversions are made, the converted foreign market values are compared to the U.S. prices.

For any transaction for which the U.S. price is greater than the foreign market value, the dumping margin is zero. For any transaction for which the foreign market value is greater than the U.S. price, the dumping margin is the difference between the foreign market value and the U.S. price divided by the U.S. price. The following table illustrates the practice:

Transaction Number	U.S. Price	Foreign Market Value	Margin of Dumping
1.	1.50	2.20	46.7%
2.	2.20	2.20	0.0
3.	2.40	2.20	0.0
4.	2.00	2.20	10.0%

After these transaction-by-transaction dumping margins have been calculated, the Department calculates a weighted average dumping margin for each of the foreign producers/exporters, as follows:

Transaction Number	(a) Margin of Dumping	(b) Total Value of Transaction	(a) x (b) / 100
1.	46.7%	$ 900	420.30
2.	0	$1000	0
3.	0	$ 200	0
4.	10.0%	$1200	120.00
		$3300	$540.30

Weighted average Margin of Dumping = $\frac{540.30}{3300.00}$ X (100) = 16.4%

If the weighted average dumping margin is 0.5 percent or greater for any company, then the Department makes an affirmative determination of less than fair value sales. If the weighted average margin for any company is less than 0.5 percent, the Department considers this to be *de minimis*, and will exclude those companies with *de minimis* margins upon receipt of timely requests for exclusion.

(5)

Supreme Court, U.S.
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No. 88-1781

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE ALGOMA STEEL CORPORATION, LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the United States International Trade Commission erred in finding that a certain class of steel products from Canada—which the Department of Commerce had found were sold in the United States at less than fair value—materially injured a domestic industry.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 865 F.2d. 240. The opinion of the Court of International Trade (Pet. App. 8a-19a) is reported at 688 F. Supp. 639.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989. The Chief Justice extended the time to file a petition for a writ of certiorari to May 4, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Title VII of the Tariff Act of 1930, 19 U.S.C. 1671 *et seq.*, the government must impose duties on imports—so-called antidumping duties—when (1) the Department of Commerce finds that a certain class or kind of foreign merchandise is being sold in the United States at less than its fair value, and (2) the United States International Trade Commission finds that an industry in the United States is being materially injured by those imports. 19 U.S.C. 1673 (1982 & Supp. V 1987). On July 22, 1985, respondents Lone Star Steel Company and CF&I Steel Corporation filed with the Commission and the Department of Commerce petitions alleging that an industry in the United States was being injured by imports of oil country tubular goods (OCTG) from Canada. 51 Fed. Reg. 15,030 (1986). They alleged that such goods, which are hollow steel products used to drill into the ground, were being sold in the United States at less than fair value.[1]

The Department of Commerce investigated the allegation. On April 22, 1986, the Department published its finding that "oil country tubular goods (OCTG) from Canada are being, or are likely to be, sold in the United States at less than fair value." 51 Fed. Reg. 15,029 (1986). The Commerce Department excluded the goods of Welded Tube of Canada, Ltd. from its finding because Welded Tube did not have any sales in the United States at less than fair value. *Ibid.*

The United States International Trade Commission then determined that an industry in the United States was materially injured by the class of imports found by the Commerce Department to be sold at less than fair value

---

[1] In general, an imported good is sold at less than fair value under the Tariff Act if the same good costs more in the importer's home country. See 51 Fed. Reg. 15,030 (1986).

(Pet. App. 20a-31a). In making that finding, the Commission considered the effect on the domestic industry of all imports of OCTG from Canada except those goods made by Welded Tube, which the Department of Commerce had found did not sell at less than fair value (*ibid.*).

2. Petitioner, a Canadian manufacturer of OCTG, sought judicial review of the Commission's decision in the Court of International Trade. Petitioner argued, among other things, that the Commission erred in considering the effect of the class of goods that the Department of Commerce had found were being sold at less than fair value—*i.e.*, OCTG from Canada (but not Welded Tube's goods). Petitioner asserted that it, as well as other Canadian exporters, sold some of its goods in the United States at fair value. Petitioner contended that such goods sold at fair value should have been excluded from the Commission's injury analysis.

The Court of International Trade upheld the Commission's decision (Pet. App. 8a-19a). The court ruled that the Commission did not violate the statute by considering all imports into the United States of OCTG by Canadian firms that were found by the Department of Commerce to have sold a significant percentage of their goods at less than fair value. Moreover, the court noted that this "is not a case of few LTFV [less than fair value] sales but of LTFV sales as a substantial percentage of all sales" (*id.* at 18a).

The court of appeals affirmed. It held that, under the statute, "the terms of any individual sale do not matter" (Pet. App. 3a). Rather, the court ruled, the statute is concerned with injuries to domestic industries that result from the importation of "a 'class or kind' of * * * merchandise [that] is sometimes sold at LTFV" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Thus no further review is warranted.

Petitioner renews its argument (Pet. 13-26) that the Commission erred in considering the effect on domestic industry of all OCTG imported into the United States by Canadian firms that have sold a substantial percentage of such goods at less than fair value. That claim is inconsistent with the language of the Tariff Act and the longstanding interpretation and practice of the Commission and the Department of Commerce.

1. Section 731 of the Tariff Act (19 U.S.C. 1673 (1982 & Supp. V 1987)) sets forth the rules governing whether an antidumping duty will be imposed. It provides:

> If—
>
> (1) the administering authority [*i.e.*, Department of Commerce] determines that a class or kind of merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty * * *.

Accordingly, Section 731 directs the Commerce Department to consider whether "a class or kind of merchandise is being" unfairly imported. Thus, contrary to petitioner's suggestion (Pet. 16-17), the Department of Commerce is not required to determine whether each and every sale within that class was at less than fair value. And the Commission is directed by Section 731 to consider the effect on domestic industry of the same merchandise that was the focus of the Department of Commerce's finding—*i.e.*, the "class or kind of merchandise" that was found to be imported at less than fair value.

Here, the Commerce Department found that goods in a particular class—OCTG from Canada (excluding the imports of Welded Tube)—were being sold in the United States at less than fair value. The Commission, following the command of Section 731, examined those imports of OCTG from Canada and found that they had materially injured a domestic industry. Accordingly, the Commission's action followed from the plain meaning of the statute.[2]

2. Contrary to petitioner's claim (Pet. 17-24), the legislative history of Section 731 does not require the Court to disregard the natural meaning of the statute. Section 731 was added to the Tariff Act by the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 162. Nothing in the history of that Act suggests that the Department of Commerce must identify individual sales at less than fair value and that the Commission is limited to examining only the injury caused by such sales. The Senate

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[2] Petitioner relies on Section 735 of the Tariff Act (19 U.S.C. 1673d (1982 & Supp. V 1987)). That section governs the procedure for investigating complaints and reaching a final decision. It does not modify the authorization in Section 731 to make class-wide decisions regarding whether merchandise is being unfairly imported.

Report accompanying the 1979 legislation states that duties will be imposed when "an industry [is] materially injured 'by reason of' less-than-fair-value imports." S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979). It then specifies that the Commission must "consider the volume of imports of merchandise with respect to which the administering authority has made an affirmative final determination on * * * less-than-fair-value sales." *Id.* at 86. Thus, the Senate Report simply reiterates the scheme established by the statute; the Department of Commerce must find that goods are being unfairly imported and the Commission must find that those imports are harming a domestic industry. The Senate Report, however, suggests no reason to adopt an unnatural meaning for the phrase "a class or kind of [foreign] merchandise" in Section 731. Hence, there is no basis for concluding that Congress intended to require the Department of Commerce (and consequently the Commission) to make findings with respect to each and every import transaction.

In addition, the Commission's interpretation of the statute is consistent with the general structure of the Tariff Act. Under the statute, an order imposing an antidumping duty applies to all imports within the class found by the Department of Commerce to be unfairly imported. 19 U.S.C. 1673e(a). Accordingly, the Commission properly considers the effect of all imports within that class—*i.e.*, all merchandise of the type potentially subject to antidumping duties.

To be sure, members of Congress cautioned the Commission not to consider the adverse effects of fairly traded imports. See, *e.g.*, H.R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979). But that observation says nothing about which imports are fairly traded or whether the government may focus on a class of unfairly imported goods. The Department of Commerce, following its rea-

sonable reading of the Tariff Act, determined that OCTG from Canada were not being fairly traded. The Commission then found that such merchandise adversely affected a domestic industry. Thus, the Commission acted in accordance with congressional intent and considered only the adverse effect of a class of unfairly imported goods.

Moreover, the Commission has consistently held its view of the statute since the passage of the Trade Agreements Act in 1979. See, *e.g.*, *Strontium Nitrate from Italy*, Inv. No. 731-TA-33 (Final), USITC Pub. 1155 (June 1981). The Commission's consistent and longstanding interpretation of the statute that it enforces is entitled to substantial deference. See *United States* v. *Clark*, 454 U.S. 555 (1982). This is particularly true in light of the fact that the Commission's practice has been brought to the attention of Congress. See *Options to Improve the Trade Remedy Laws: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 1178-1179 (1983). Congress has not altered the Commission's practice even though it has since twice amended other aspects of the statute. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1324(b)(3), 102 Stat. 1201; Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 612(a)(2)(A), 98 Stat. 3033.

3. Petitioner next argues (Pet. 21-24) that the Commission's reading of the Tariff Act runs afoul of an international trade agreement – the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT), Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650. Even if there were a conflict between the Act and the agreement, however, the statute would prevail. See 19 U.S.C. 2504(a) ("No provision of any trade agreement * * * which is in conflict with any statute of the United States shall be given effect."). But there is no such conflict.

GATT directs signatory countries not to impose duties on fairly valued imports. The agreement, however, does not specify how signatories must accomplish that result. The Department of Commerce achieves that goal in two ways. First, it excludes from its orders those companies that have no or only de minimis sales at less than fair value in the United States. Second, although all imports covered by the Department's and the Commission's findings become subject to an antidumping order, an importer may obtain an annual review by the Department of Commerce to determine whether individual transactions were made at less than fair value. Accordingly, sales at fair value will ultimately not be assessed an antidumping duty. 19 U.S.C. 1675(a) (1982 & Supp. V 1987); 19 C.F.R. 353.53. Particularly in light of its administration by the Department, therefore, the statute fully comports with the intent of the trade agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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BRIEF OF AMICUS CURIAE CONSUMERS FOR WORLD TRADE IN SUPPORT OF THE PETITION

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June 7, 1989

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BRIEF OF AMICUS CURIAE CONSUMERS FOR WORLD TRADE IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE*

Consumers for World Trade ("CWT") is a nonprofit organization devoted to promoting free international trade for the economic benefit of consumers in the United States. CWT believes that free trade benefits consumers by ensuring greater competition in the market place, thereby creating lower prices, wider consumer choice, greater innovation, and greater responsiveness to consumer preferences.

CWT supports the proper enforcement of antidumping laws to remedy unfair trade practices that injure domestic industries. However, CWT strongly opposes the misuse of the United States trade remedy laws to erect protectionist barriers against fairly traded imports. This case presents a fundamental issue that goes to the very purpose of the U.S. antidumping law. The resolution of the issue presented by this case will affect virtually every International Trade Commission ("ITC") determination under the antidumping law, potentially affecting billions of dollars of trade. As such, this case is of great concern to U.S. consumers, who will ultimately be hurt if the decision of the Federal Circuit is not reversed.

ARGUMENT

I. The Federal Circuit's Decision Distorts the Purposes of the U.S. Antidumping Law by Allowing the ITC to Consider the Impact of Fairly Traded Imports in Making Its Causation Analysis.

The consequences of this case extend far beyond the immediate parties. The Federal Circuit has ruled

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* As required by Rule 36 of the Supreme Court Rules, written consent for the filing of this brief was obtained from all parties. Copies of these consents are being filed concurrently herewith.

that the ITC may base an affirmative final injury determination in part on the impact of *fairly traded* imports. Because an affirmative injury determination is a legal prerequisite to the issuance of an antidumping duty order, the decision in this case allows domestic producers to obtain protection from import competition without demonstrating that *dumping* has caused injury to the domestic industry. This is contrary to the antidumping law, and the Federal Circuit's decision should be reversed.

The U.S. antidumping law is intended to afford U.S. producers relief from *unfair* price discrimination. For this reason, the law requires U.S. producers to prove not only that imported goods are being sold at less than their home market price, but also that these "dumped" imports have caused material injury to a domestic industry before an antidumping order may be issued:

> This Act is not a "protectionist" statute designed to bar or restrict U.S. imports; rather, it is a statute designed free U.S. imports from unfair price discrimination practices. . . .
>
> . . .The Antidumping Act is designed to discourage and prevent foreign suppliers from using unfair price discrimination practices to the detriment of a United States industry.

S. Rep. No. 1298, 93rd Cong. 2d Sess. 179 (1974). The antidumping law, therefore, requires that the ITC must find a causal link between the dumping and any injury to the domestic industry that the ITC may find. Injury must be "by reason of" the dumped imports. *See* 19 U.S.C. § 1673 (1982 & Supp. IV 1986).

The House Ways and Means Committee stated in its report on the Trade Agreements Act of 1979,[1] which enacted the current version of the antidumping law, that:

> [M]aterial injury must be "by reason of" . . . less than fair value imports. . . . The law does not, however, contemplate that injury from such imports be weighted against other factors (e.g., the volume and prices of . . . imports sold at fair value, contraction in demand or changes in patterns of consumption . . . .

H.R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979).

To implement this Congressional intent, the law provides that the ITC should consider in its final determination whether a domestic industry has suffered material injury "by reason of imports . . . of the merchandise with respect to which [Commerce] has made an affirmative determination [of dumping]." 19 U.S.C. § 1673d(b)(1) (1982 & Supp. IV 1986).

II. Unless Remedied by This Court, the Federal Circuit's Decision Will Needlessly Hurt U.S. Consumers and Industry.

By allowing domestic industries to misuse the antidumping law to obtain protection from fairly traded imports, the effect of the Federal Circuit's decision in this case will be to protect inefficient U.S. industries. American consumers will pay the price for this unwarranted protectionism in the form of higher prices. American industry will also be harmed in the long run through lost jobs and the further decline in

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[1] Pub. L. No. 96-39, § 101, 93 Stat. 144, 150-89 (1979) (codified as amended at 19 U.S.C. §§ 1673-1677g).

the competitiveness of American industry in world markets.

CONCLUSION

For the reasons set forth above, CWT respectfully requests that the Petition for a Writ of Certiorari of Algoma Steel Corporation, Limited, be granted.

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IN THE

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Respondents,

and

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Respondent,

IPSCO, INC. and IPSCO STEEL, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF THE PETITION

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IN THE

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BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE*

The American Association of Exporters and Importers ("AAEI") represents over 1,200 American companies that are involved in the transfer of goods and services between nations. Member companies sell a broad range of products, from chemicals and electronics to table wine and footwear. The primary mission of AAEI during its 68 years of existence has been to promote fair and open international trade. An AAEI member generally will be directly involved in every proceeding in which an American manufacturer or group of workers has claimed that special countervailing or antidumping duties should be paid when merchandise is entered into the commerce of the United States. AAEI therefore has a special interest that the International Trade Commission ("ITC") determine injury in a dumping case according to statute and in a fair manner.

AAEI believes that 19 U.S.C. § 1673d (1982 & Supp. IV 1986) mandates fairly traded imports to be excluded from the ITC's material injury determination. Accordingly, AAEI members are concerned that the U.S. antidumping law be enforced properly. In this case it is AAEI's position that the ITC practice challenged in this case is not in accordance with the U.S. antidumping law and is an unjustifiable impediment to international trade.

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* As required by Rule 36 of the Supreme Court Rules, written consent for the filing of this brief was obtained from all parties. Copies of these consents are being filed concurrently herewith.

ARGUMENT

I. The ITC Is Incorrect in Using Fairly Traded Imports to Determine "Material Injury."

The Federal Circuit's decision sanctioned the ITC's practice of presuming that all imports investigated by the Department of Commerce ("Commerce") were sold at less than fair value. In its final affirmative injury determination, the ITC disregarded explicit findings by Commerce that some imports of Oil Country Tubular Goods ("OCTG") were fairly traded. As a result, the ITC's final affirmative injury determination was based, in part, on an assessment of the impact of *fairly traded* imports, in direct contravention of the antidumping law.

The U.S. antidumping law was intended to implement the antidumping code of the General Agreement on Tariffs and Trade (GATT).[1] The GATT Antidumping Code[2] requires that fairly traded goods be excluded from the causation analysis:

> It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury . . . . There may be other factors* which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.

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[1] General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

[2] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 [hereinafter GATT Antidumping Code].

GATT Antidumping Code at Art. 3, 31 U.S.T. at 4927. The GATT Antidumping Code defines "other factors" as follows:

> Such factors include, *inter alia*, the volume and price of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

GATT Antidumping Code, 31 U.S.T. 4927 n.5.

The House Ways and Means Committee, in its report on the Trade Agreements Act of 1979,[3] which amended U.S. law to conform it to the GATT Antidumping Code, explicitly stated that the ITC's affirmative injury determination may *not* be based on the impact of fairly traded imports:

> [M]aterial injury must be "by reason of" . . . less than fair value imports. . . . The law does not, however, contemplate that injury from such imports be weighted against other factors (*e.g.*, the volume and prices of . . . imports sold at fair value, contraction in demand or changes in patterns of consumption . . . .

H.R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979).

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[3] Pub. L. No. 96-39, § 101, 93 Stat. 144, 150-89 (codified as amended at 19 U.S.C. §§ 1673-1677g).

II. Unless Remedied by this Court, the Federal Circuit's Decision Will Unjustifiably Penalize U.S. Importers and Impede Free Trade.

The issuance of an antidumping order affects most directly U.S. importers, who are liable for the antidumping duties. Importers must deposit in cash estimated antidumping duties on all entries of products covered by the order. These cash deposits are applicable to *all* imports covered by the order regardless of whether Commerce ultimately determines, in a subsequent administrative review, that the imports were fairly traded and thus not subject to antidumping duties. Moreover, until Commerce completes its administrative review and determines the amount of duties actually owed, the importer faces an unlimited contingent liability. Completion of the administrative review can, and often does, take years. Because of these financial burdens, it is important that a U.S. business that imports merchandise can rely on the "letter" of U.S. trade law. Injury alleged to be caused by fairly traded imports should be addressed through other pertinent statutes, such as §§ 201 and 406 of the Trade Act of 1974.[4] The inclusion of fairly traded imports to decide injury in a dumping case blurs the distinction between fair trade and "unfair" trade—thereby penalizing honest U.S. importers who follow internationally acceptable practices.

To the extent that the erroneous interpretation of the antidumping law places an unreasonable burden on the import of goods into the United States, not only are American importers injured, but American exporters run the risk of being the victims of similar

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[4] 19 U.S.C. §§ 2251, 2436 (1982 & Supp. IV 1986).

unreasonable burdens abroad. The law is intended to strike a careful balance between competing goals of remedying trade practices determined to be unfair and promoting free and fair trade. The Federal Circuit's decision upholding the ITC's practice of commingling dumped and fairly traded imports in its causation analysis destroys this delicate balance and will have a significant adverse impact on American businesses that engage in international trade.

CONCLUSION

For the reasons set forth above, AAEI respectfully requests that the Petition for a Writ of Certiorari of Algoma Steel Corporation, Limited, be granted.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICUS CURIAE THE PROVINCE OF ONTARIO IN SUPPORT OF THE PETITION

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BRIEF OF AMICUS CURIAE THE PROVINCE OF ONTARIO IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The Province of Ontario, taken alone, is the United States' second largest single trading partner, after Japan. In 1988, Ontario exports to the United States exceeded 47 billion dollars (U.S.), and two-way trade exceeded 98

[1] This brief is filed with the consent of the parties. Copies of the consent letters are on file with the Clerk.

billion dollars (U.S.).[2] Eighty-six percent of Ontario exports are destined for the United States.[3] This trade spans a wide range of industries and products, encompassing both raw materials and manufactured goods, from automobiles and steel to pulp products. The Province thus has a substantial interest in the manner in which the United States enforces its trade laws.

The Province has significant concerns about the long-term adverse consequences for United States-Ontario trade caused by the decision of the Court of Appeals for the Federal Circuit in this case. The Federal Circuit ruled that in making a final determination of material injury under the United States antidumping law, the United States International Trade Commission ("ITC") is not obligated to differentiate between the impact of fairly traded and unfairly traded imports. If the ITC is permitted to disregard the actual percentage of imports determined to have been sold at less than fair value and effectively presume that 100 percent of the subject imports were dumped, the result will be that numerous antidumping orders will be issued without any showing that dumping—the unfair trade practice that the law is intended to remedy—was a cause of material injury to a domestic industry. The Province of Ontario believes that such a result is contrary to both United States law and the Antidumping Code of the General Agreement on Tariffs and Trade ("GATT"), an international agreement to which Canada and the United States are signatories. Moreover, because of the potential for significant disruption to United States-Ontario trade that such unwarranted antidumping duty orders pose, the Province believes that it is critical that this Court review the Federal Circuit's decision.

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[2] Statistics Canada, Exports by Commodity, Catalog 65-004 (Dec. 1988). Canadian dollar figures converted to U.S. dollars at the Bank of Canada average 1988 exchange rate.

[3] *Id.*

ARGUMENT

I. The Federal Circuit's Erroneous Interpretation of the Antidumping Law Poses the Potential for Significant and Unwarranted Disruption of United States-Ontario Trade.

The issuance of any antidumping duty order, even a lawful one, creates considerable disruption to trade. The final assessment of duties is suspended indefinitely on all imports of merchandise of the class covered by the order. Final assessment of antidumping duties typically must wait until the United States Department of Commerce completes its administrative review of the order, a process that often takes several years. In the interim, importers must deposit in cash estimated antidumping duties, which often bear little or no relation to the amount of duties ultimately assessed.

The requirement of an injury determination functions as a check on the indiscriminate use of the antidumping law. Domestic interests seeking an antidumping duty order must demonstrate not only the existence of dumping, but also that a domestic industry was materially injured by the dumping, or threatened with such material injury. As demonstrated by the legislative history of the Trade Agreements Act [4] and the text of the GATT Antidumping Code [5]—on which the antidumping provisions of the Act were based—the injury determination contemplated by the law must be more than a finding that competition from imports has played a role in the poor performance of an industry. Rather, there must be a causal link between *dumping* and the injury to the domestic industry.

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[4] Pub. L. No. 96-39, 93 Stat. 144 (1979), relevant portions codified as amended at 19 U.S.C. §§ 1673 *et seq.* (1982 & Supp. V 1987).

[5] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650.

The ITC practice upheld by the Federal Circuit in this case, whereby the ITC deliberately ignores findings by the United States Department of Commerce that a substantial percentage of the subject imports were fairly traded and instead presumes that 100 percent of the imports were dumped, effectively eliminates the necessity of proving a causal link between dumping and injury. As a result, the requirement of an injury finding no longer serves its intended purpose of confining the issuance of antidumping duty orders to those instances where unfair price discrimination has caused material injury to a domestic industry.

Letting this improper interpretation of the law stand would have a particularly adverse effect on United States-Ontario trade. The Ontario economy is integrally linked to the United States midwestern economy. Hundreds of firms have operations on both sides of the border, and there are close relationships between suppliers and manufacturers in the other country that are unusual in international trade. Products frequently cross the border several times at successive levels of manufacture before a finished good is produced, with firms on both sides of the border coordinating production schedules and cooperating to an unusual degree.

The application of United States trade laws to this commerce is not simply a matter of assessing duties on finished goods that arrive at a port. The potential disruption that can be caused by misapplication of the antidumping law is proportionately greater as a result of the complex and sensitive relationships involved, making it even more important that use of the antidumping law be limited—as intended by Congress—to those instances where unfair trade, and not simply a large volume of fair trade, has caused or threatened material injury.

The Federal Circuit has exclusive jurisdiction over appeals under the antidumping law, and its decision will

be the "law of the land" unless reviewed by this Court. If the decision is permitted to stand, United States industries that are performing poorly can certainly be expected to invoke the antidumping law to obtain protection from fairly traded imports. The issuance of such unwarranted antidumping duty orders will likely have a substantial negative impact on United States-Ontario trade, as it already has had with regard to the merchandise exported to the United States from Ontario by petitioner Algoma Steel Corporation. Legitimate trade between the United States and Ontario will be needlessly disrupted, to the detriment of both.

II. The Discrepancy Between the Federal Circuit's Decision and United States International Obligations Mandates Review by This Court of the Issue Presented *Before* That Issue Enters the Diplomatic Stage.

In 1979 Congress enacted the Trade Agreements Act, amending the United States antidumping law to conform to the GATT Antidumping Code, to which the United States became a signatory that year. The GATT Antidumping Code sets forth certain requirements that signatory nations must meet before they may impose antidumping duties on imported merchandise. One of the most important of these is a demonstration that dumped imports are causing material injury to a domestic industry. The Code makes clear that in making this finding, care must be taken to distinguish between the effects of dumped imports and the effects of other factors that could also be injuring the industry.

In particular, Article 3 of the Code requires that the effect of fairly traded imports not be attributed to the dumped imports:

> It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury . . . . There may be other factors* which at the same time are injuring the industry, and the in-

> juries caused by other factors must not be attributed to the dumped imports. [Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT Antidumping Code), Apr. 12, 1979, art 3, para. 4, 31 U.S.T. 4919, 4927, T.I.A.S. No. 9650.]

The footnote in the foregoing quotation explains that "[s]uch factors include, *inter alia*, the volume and prices of imports not sold at dumping prices . . . ." *Id.* at n.5.

There is no indication that Congress intended United States law to deviate from the GATT Antidumping Code on this point. To the contrary, the relevant committee reports on the Trade Agreements Act of 1979 demonstrate, in terms almost identical to the Code, that an affirmative finding of injury must be based on the impact of dumped imports only:

> [M]aterial injury must be 'by reason of' . . . less than fair value imports . . . . The law does not, however, contemplate that injury from such imports be weighted against other factors (e.g., the volume and prices of . . . imports sold at fair value, contraction in demand or changes in patterns of consumption . . .). [H.R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979). *See also* S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979).]

In reaching the contrary conclusion, the Federal Circuit simply ignored a statutory provision that fully supports the interpretation urged by Petitioner. That provision flatly specifies that "[t]he Commission shall make a final determination of whether an industry in the United States is materially injured . . . by reason of imports . . . of the merchandise with respect to which [the United States Department of Commerce] has made an affirmative determination [of dumping] . . . ." 19 U.S.C. § 1673d(b)(1) (1982 & Supp. V 1987).

If the Federal Circuit's decision is permitted to stand, the United States will be, based on a practice confirmed

by the final decision of its courts, in violation of its international obligations. This is not what Congress intended, and creates the risk that the United States, due to the error of the court below, will be called upon to answer in the diplomatic arena for a practice that was never intended by the Congress to exist. Review by this Court would provide an opportunity to eliminate the violation of the United States' international obligations.

CONCLUSION

For the foregoing reasons, and those in the Petition, the Province of Ontario respectfully requests that the Petition for a Writ of Certiorari be granted, and that the decision below be reversed.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE CANADIAN EXPORTERS' ASSOCIATION

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BRIEF OF AMICUS CURIAE CANADIAN EXPORTERS' ASSOCIATION

INTEREST OF THE AMICUS CURIAE [1]

The Canadian Exporters' Association is a non-profit organization consisting of about one thousand Canadian companies—including manufacturers, trading houses, commodity producers, transportation companies, consulting engineers, construction companies, consultants, financial institutions, and service companies—all with a common interest in exports. Founded in 1943, the CEA is the only national association in Canada devoted solely to advancing the interests of Canadian exporters. Among its

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[1] All parties have consented to the filing of this brief. Copies of their written consents have been filed with the Clerk.

objectives is to encourage domestic and international programs conducive to the sustained growth of export trade.

Canada is this nation's largest trading partner. CEA's members (including petitioners and other Canadian steel companies) accounted for a substantial portion of the $84.3 billion of merchandise exported by Canada to the United States in 1988. The organization believes that the question presented by the petition in this case has broad implications for the future conduct of fair trade between our two countries.

ARGUMENT

Under U.S. law, antidumping duties may be imposed only upon proper findings that "a class or kind of foreign merchandise" is sold in the United States at less than its fair value and that a U.S. industry is materially injured "by reason of imports of that merchandise." 19 U.S.C. § 1673. In this case, the Department of Commerce determined that, during a six-month period in 1985, some oil country tubular goods imported from Canada were sold at less than fair value. The Department's sale-by-sale analysis demonstrated, however, that a substantial portion of such imports—in excess of 50 percent—was sold at fair value.

The International Trade Commission found that a domestic industry was materially injured by reason of the importation of oil country tubular goods. Based on that finding, the Department of Commerce issued an antidumping duty order, which requires importers to make burdensome cash deposits for estimated duties on the entry of oil country tubular goods.

The dispute in this case arises because the Commission, in making its injury determination, took into account *all* imports of oil country tubular goods, including the substantial percentage sold at *more* than fair value. For all that appears from the record, the injury to domestic industry may have been caused exclusively by the fairly traded imports and not at all by the less-than-fair-value sales.

The question is whether a finding of injury from sales of a class of merchandise at less than fair value may properly take into account injury from sales of the same class of merchandise at more than fair value. The Trade Agreements Act of 1979 specifies that antidumping duties may be imposed only if a domestic industry is injured "by reason of" sales of dumped merchandise. 19 U.S.C. §§ 1673, 1673d. It is incompatible with that language to impose antidumping duties when the injury is caused by sales at fair prices.

The legislative history confirms that Congress never intended such a result. The statute was enacted to conform U.S. antidumping law to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code). H.R. Rep. No. 317, 96th Cong., 1st Sess. 59 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 61 (1979). Article 3 of the Antidumping Code provides, in terms that speak directly to the question here, that "it must be demonstrated that the dumped imports are, *through the effects of dumping*, causing injury"; "injuries caused by other factors"—including "the volume and prices of imports not sold at dumping prices"—"must not be attributed to the dumped imports." Antidumping Code Art. 3, para. 4 & n.5, 31 U.S.T. 4919, T.I.A.S. No. 9650 (emphasis added).

In its report on the legislation, the House Committee on Ways and Means made clear that it understood and endorsed the causation requirement of the Antidumping Code. It stated that "material injury must be 'by reason of' the subsidized or less than fair value imports" and that "the law does not contemplate" taking into account "other factors"—including "the volume and prices of . . . imports sold at fair value"—"which may be contributing to overall injury to an industry." H.R. Rep. No. 317, *supra*, at 46-47.

The decision of the Court of Appeals erroneously transforms the antidumping law, designed to protect against

injury only from *unfairly* traded imports, into a law that protects against injury even from *fairly* traded imports. Section 201 of the Trade Act of 1974, 19 U.S.C. § 2251, is an example of the latter; its standards are quite different from those of the antidumping provisions at issue here. Congress recognized that difference. The Committee on Ways and Means stated that "[t]his statute is not intended to 'protect or remedy' an injury from imports as contemplated under section 201 of the Trade Act of 1974, nor is it just one of several remedies from which the Administration may choose to remedy import injury to a domestic industry. Rather, it is a remedy targeted at a specific type of injury caused by unfair import competition, and the Committee expects it to be administered in that context." H.R. Rep. No. 317, *supra*, at 46.

The decision below is likely to have a significantly deleterious effect on Canadian-U.S. trade. Under an antidumping duty order, U.S. importers must pay estimated duties, in the form of cash deposits, on the entry of all the merchandise covered by the order. It may not be until years later that final duties are assessed. Although imports at fair value may not ultimately be assessed antidumping duties, the need to deposit estimated duties can put an exporter or an importer out of business long before the final duties are assessed. That is so because the estimated duties impose a real financial burden, last a long time, and introduce a potentially crippling element of uncertainty into all affected transactions. As the petitioner correctly notes, "[i]mporters . . . face an unlimited contingent liability if they import merchandise subject to an antidumping duty order." Pet. 25 n.29.

Because the Federal Circuit has exclusive jurisdiction to review the ITC's injury determination under the antidumping law (*see* 28 U.S.C. §§ 1295, 1581), its decision in this case, if left undisturbed, will effectively foreclose further consideration of the significant statutory issue in this case. We are concerned about the practical implica-

tions of that decision for fairly traded goods between our two countries. More generally, we are concerned that the decision below, by interpreting the statute in a manner that departs from the Congressional purpose and the terms of the Antidumping Code, jeopardizes the free trade objectives that animate both U.S. law and the international trade agreements to which the United States is a party. We urge this Court to review the judgment of the Court of Appeals to ensure that those important objectives are vindicated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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